SUPREME COURT U.S.

In The

APR 9 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1974

No. 74-1273

JOSEPH E. SHAMY,

Petitioner,

vs.

JONATHAN GOLDSTEIN, United States Attorney for the District of New Jersey; FRANK B. PARISI, Special Agent, Internal Revenue Service; and E. H. KLINSMAN, District Director of Internal Revenue Service of New Jersey,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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In The

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court is a letter opinion, unreported and appears in the appendix, *infra* (1a). The opinion of the Court of Appeals for the Third Circuit entered on January 10, 1975 is unreported and appears in the appendix, *infra* (8a).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on January 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

In this suit, the United States District Court dismissed a complaint for failure of the complaint to state a cause of action upon which relief could be granted. The Court of Appeals for the Third Circuit affirmed the judgment of the United States District Court.

The questions presented are:

1. Does the United States Attorney have the power to issue a subpoena without prior judicial approval, requiring the production of books, records, materials and things for the purpose of submitting that material to the Internal Revenue Service to use as a springboard in a continuing investigation and not for the purpose of presenting a matter to the Grand Jury for its determination, in accordance with the law? Is there no redress in the law for such conduct?

2. Does a complaint which alleges, in essence, that the United States Attorney issued a Grand Jury subpoena (duces tecum and ad testificadum) in bad faith and with improper motive for the purpose of discovery and not for the purpose of aiding a Grand Jury in the exercise of its lawful function, state a cause of action for which relief can be granted?

3. Does not Rule 6(e) of the Federal Rules of Criminal Procedure provide for secrecy in respect to all evidence submitted to a Grand Jury? Is there no sanction in the law for purposeful violation of that rule?

4. Is it not the law that when regulations are provided by the Internal Revenue Service in respect to the procedural application of the provisions of the Internal Revenue Code that such procedural regulations must be complied with? If they fail to do so, is there no remedy?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth and Fifth Amendments of the Constitution of the United States are involved herein.

The federal statute involved is Internal Revenue Code of 1954 (26 U.S.C.), Sections 7201-7216; 7801(a). (References and citations in this petition are to sections of the Internal Revenue Code of 1954, as amended, unless otherwise indicated.)

STATEMENT OF THE CASE

The petitioner was under investigation by the Internal Revenue Service for some time prior to March 16, 1973. On the date of March 16, 1973, the petitioner was subpoenaed to appear before a Federal Grand Jury in the United States Courthouse, Federal Square, in the City of Newark, New Jersey, which subpoena required the petitioner to produce certain books, records, material and other things described in the subpoena.

Your petitioner responded to this subpoena and brought the records required of him and physically presented them to the Grand Jury.

All of these records were immediately and physically turned over to the Internal Revenue Service. At the time of this event, the Internal Revenue Service had not as yet completed its investigation, nor had it as yet made any recommendation to the Justice Department for prosecution. (This recommendation was made by the General Counsel's Office on June 13, 1974. This fact is not included in the pleadings, nor is it a part of the

record; it was an event subsequent to the pleadings in this matter.) Your petitioner, through his counsel, inquired as to why these records were turned over to the Internal Revenue Service and was advised that such delivery was made pursuant to an order of the Court. No such order was ever produced and, in fact, it is now admitted that such an order never existed. Your petitioner alleged in the verified complaint that he had reason to believe that other witnesses were subpoenaed before the Grand Jury and that their testimony was made known to the Internal Revenue Service and the documents which they surrendered were turned over as well. Suit was instituted to regain the documents made available to the Internal Revenue Service in the manner herein referred to and to restrain the use of the testimonial evidence imparted to that agency and, in addition, to restrain the use of other evidence inferentially obtained thereby.

In addition, the complaint alleges that the petitioner was denied his constitutional rights of equal protection of the law and due process of the law. This allegation is supported by the fact that Congress, in enacting the Internal Revenue Code, and the Secretary of the Treasury, by adopting regulations thereunder, wove a method of enforcing and administering the Code, including those provisions dealing with crimes (Sections 7201-7216), in a logical and sequential order which informs each citizen of the procedural steps that may be taken against him before a matter is referred by the Internal Revenue Service to the Justice Department or, in some instances, to the United States Attorney's Office, for presentation to a Grand Jury. That scheme takes the following form: (a) The Internal Revenue Code defines certain acts as crimes and sets forth criminal sections in respect thereto (Sections 7201-7216); (b) The

secretary or his delegate has the power to enact regulations in respect to the "enforcement and administration" of the Code, including those sections dealing with crimes (Section 7801(a)); (c) The Secretary has, in fact, promulgated such regulations (39 F. Reg.—March 29, 1974); and (d) The regulations provide a method by which the Internal Revenue Service shall process a case where criminal conduct is involved. The steps are as follows: (a) The Intelligence Division of the Internal Revenue Service is charged with the enforcement of the criminal provisions of the Code and "recommends prosecution, when warranted" (Section 1118.6) to the Regional Counsel; and (b) Regional Counsel reviews "recommendations of prosecution in criminal cases received in the field and prepares and refers such cases (other than alcohol and tobacco tax cases) to the Department of Justice or, where authorized by the Department of Justice, directly to the United States Attorney, or, where prosecution is not deemed warranted, prepares criminal action memoranda, setting forth the reasons against the prosecution and closes such cases . . ." (Section 1116(e)).

This petitioner takes the position that the procedure is exclusive. In fact, on June 13, 1974, long after the Grand Jury subpoenas were issued, this petitioner was advised that Regional Counsel had, in fact, recommended this matter to the Department of Justice for prosecution. Why was such a recommendation made if the Grand Jury was legitimately examining the case in March of 1973.

REASONS FOR GRANTING THE WRIT

In 1973, in *United States v. Dionisio,* 410 U.S. 1, 35 L. Ed. 67 (1973), the Court weighed the effects of a Grand Jury subpoena issued in good faith and for legitimate purposes against the intrusion of the constitutionally protected rights of the Fourth Amendment and held that the issuance of such a subpoena, although without prior judicial approval, was not an intrusion in the constitutional sense.

That case raised, but did not answer, the question of how one tests the good faith and legitimate purposes of such a subpoena. When can such a subpoena, in the words of *Dionisio,* "trench upon the legitimate rights" of one affected by it? These questions are of wide interest both to the public and to the bar.

I.

This decision is in direct conflict with the Third Circuit's own previous decision and in contradiction with the principles enunciated in *Dionisio.*

In *In re Grand Jury Proceedings,* 486 F.2d 85 (1973), the Third Circuit properly held that a Grand Jury subpoena may be tested on constitutional or non-constitutional grounds, since the subpoena, when issued, had no prior judicial approval and, consequently, the matter of its use should not be left solely to the executive branch of the Government, but could and should be reviewed by the courts under certain conditions, some of which were set forth in *In re Grand Jury Proceedings, supra.*

Judge Gibbons, in his opinion, in *In re Grand Jury Proceedings, supra,* clearly stated that *Dionisio's* holding did not deny the right of an aggrieved party to test the process requiring his appearance, and attempted to lay down some principles forming the basis of such an inquiry and thereby clearly placing the courts in a position of intervening between the executive branch of the government, which caused the issuance of the subpoena, and the person subject to its mandate. The case *sub judice* clearly contains allegations which, if proven, would result in the relief applied for.

Dionisio contemplates that the Grand Jury subpoena was issued in good faith and for a legitimate purpose. Since *Dionisio* concluded that the subpoena was issued for legitimate reasons, it was not compelled and, consequently, did not prescribe the method by which one may test a subpoena where the allegation clearly is, as in this case, that the subpoena was not issued in good faith and for legitimate purposes.

The Court in *Dionisio, supra,* at page 12 had this to say:

> ". . . We indicated (*Bransburg v. Hayes, supra*) that the Constitution would not tolerate the transformation of the Grand Jury into an instrument of oppression."

The case presently before the Court clearly alleges facts in the complaint which must be presumed to be correct for purposes of determining whether the complaint states a cause of action upon which relief can be granted. Therefore, the action of the Court below was in derogation of and inconsistent with the holding of *Dionisio.*

II.

A Grand Jury subpoena not issued in good faith and for legitimate purposes is a compulsion upon a person to speak and to bring, in violation of the witness' Fifth Amendment rights.

Judge Friendly's comments in *United States v. Doe,* 405 436, 438 (2d Cir. 1968) appear to be appropriate:

> "Even though the evidence is not within a testimonial privilege, the due process clause protects against the use of excessive means to attain it."

This language was favorably commented upon in *In re Grand Jury Proceedings, supra.* Generally, it might be said that to convert a Grand Jury process from an instrument to be used in the orderly conduct of criminal procedure into what is akin to a search warrant is certainly the use of excessive means to obtain evidence.

III.

The concept of secrecy of a Grand Jury proceeding as embodied in Rule 6(e) of the Federal Rules of Criminal Procedure is not merely a rule of the court. It is an embodiment of one of the constitutional functions of the Grand Jury.

Rule 6(e) of the Federal Rules of Criminal Procedure provides that:

> "Disclosure of matters occurring before the Grand Jury other than its deliberation and the vote of any juror may be made to the attorneys for the Government for use in the performance of their duties. Otherwise, a juror, attorney, interpreter, stenographer, operator of a recording device or any typist who transcribes recorded testimony, may disclose matters occurring before a grand jury only when so directed by the Court preliminarily to or in connection with a judicial proceeding . . . ."

The complaint alleges, in clear and unequivocal language, that the concept of secrecy was violated. The United States District Court, in its opinion below, received an affidavit from the United States Attorney or his delegate, which your petitioner cannot comment upon since the Court refused counsel for your petitioner to examine the affidavit, no less to inquire in respect thereto. But the District Court's letter opinion seems to indicate that the affidavit in some way justified the United States Attorney for his violation of the concept of secrecy by delivering the documents to the Internal Revenue Service. The District Court's denial of counsel's right to examine that affidavit is reminiscent of star chamber proceedings, wherein only the Court and the United States Attorney was privy to the information, and counsel for the petitioner denied. It is clear from the allegations in the complaint that the rule of secrecy has been violated and that relief therefrom should be granted.

IV.

It is improper to conduct a Grand Jury investigation into an income tax matter until the Internal Revenue Service properly refers the matter to the Justice Department or the United States Attorney, in accordance with the provisions of the Internal Revenue Code (1954) and the regulations promulgated thereunder.

An agency of the government must scrupulously observe rules, regulations and procedures which it has established. When it fails to do so, its actions cannot stand and the courts will strike it down. *United States ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954).

The Secretary of the Treasury or his delegates propounded regulations setting forth the method in which the Internal Revenue Service shall administer the criminal sections of the Internal Revenue Code. As was indicated in other portions of this petition, the Internal Revenue Service must recommend to the Justice Department that a particular matter be brought before the Grand Jury. During the many steps of this procedure, counsel usually has an opportunity to arrange for conferences within the Internal Revenue Service to head off such a recommendation and conferences are usually granted.

In the matter presently before the Court, Grand Jury action was commenced on March 16, 1973 and the matter was referred by the Internal Revenue Service to the Justice Department with a recommendation for prosecution on June 13, 1974. (The last cited action is not a part of the pleadings, nor a part of the

record below, but it was an act subsequent to filing of the pleadings and after the judgment in the United States District Court.)

Grand Jury action, therefore, was not in accordance with the rules and regulations and your petitioner was thereby denied equal protection of the law and due process of the law, by the violation of the recognized rules and procedures in such cases made and provided.

CONCLUSION

For the reasons set forth above, it is respectively submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

s/ Robert B. Hendler

ROBERT B. HENDLER
BENJAMIN WEINER
Attorneys for Petitioner

APPENDIX

LETTER OPINION AND ORDER

(Filed May 1, 1974)

UNITED STATES DISTRICT COURT

Room 411, U.S. Post Office Building

Newark, New Jersey 07102

Vincent P. Biunno
Judge

Re: Shamy v. Goldstein, 74-314

Plaintiff filed a complaint and an application for temporary restraints on March 6, 1974. The complaint essentially alleges that plaintiff was served with a Grand Jury subpoena duces tecum requiring him to produce certain corporate records in his possession. Plaintiff complied with the subpoena and surrendered before the Grand Jury some of the required documents to the Assistant U.S. Attorney. Plaintiff asserts that documents were subsequently transferred by the Assistant U.S. Attorney to agents of the Internal Revenue Service.

Plaintiff contends that this action by the Assistant U.S. Attorney violated Rule 6(e) F.R. Crim. P. Furthermore, plaintiff suggests that because he was subjected to both administrative investigation as well as Grand Jury scrutiny, his right to equal protection has been violated.

Due to these "violations" plaintiff seeks injunctive relief restraining the presentation of the subpoenaed documents to the Grand Jury or any other governmental entity. Further, plaintiff seeks an order requiring the government to return all subpoenaed documents to him.

Jurisdiction is premised upon 28 U.S.C. 1361; supervisory jurisdiction over the Grand Jury by the District Court; and upon alleged violation of plaintiff's Fifth Amendment rights.

Defendant moves for dismissal of the complaint for failure to state a claim upon which relief may be granted, pursuant to Rule 12(b)(6) F.R.C.P.

Initially, on the matter of jurisdiction, plaintiff's reliance upon 28 U.S.C. 1361 is misplaced. In order for a claim to be cognizable under that statute, plaintiff must assert that "an officer of the Government owes him a legal duty which is a specific, plain, ministerial act 'devoid of the exercise of judgment or discretion.'" *Richardson v. U.S.*, 465 F.2d 844, 849 (3rd Cir. 1972). Furthermore, in order for an act to be ministerial, its performance must be "positively commanded and so plainly prescribed as to be free from doubt." Id. The matter of presentation of evidence before a Grand Jury does not fall into this category.

Jurisdiction, however, may be sustained pursuant to the federal court's inherent equity jurisdition to "protect rights safeguarded by the Constitution." *Bell v. Hood,* 327 U.S. 678, 684 (1946). Pursuant to this general equity jurisdiction there is

"an implied injunctive remedy for threatened or continuing constitutional violations" under 28 U.S.C. 1331(a). *Bivens v. Six Unknown Agents,* 409 F.2d 718, 723 (2nd Cir. 1969), *reversed on other grounds,* 403 U.S. 388 (1971). *On remand* 456 F.2d 1339 (2nd Cir. 1972).

It is clear that a complaint should not be dismissed for failure to state a claim unless "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45 (1957)." *Scheuer v. Rhodes,* 42 U.S.L.W. 4543, 4544 (U.S. April 17, 1974). Thus, the instant complaint and the allegations contained therein must be fully examined.

Count I of the complaint alleges that plaintiff's "rights" under Rule 6(e), F.R. Crim. P. have been violated. Therefore, plaintiff contends he is entitled to injunctive relief. The alleged violation of plaintiff's 6(e) "rights" is asserted to be the transfer by the Assistant U.S. Attorney to I.R.S. Agents of documents subpoenaed by the Grand Jury. Such procedure is not improper so long as the documents are subpoenaed pursuant to a Grand Jury investigation and "expert" testimony is required to assist the Grand Jury in its investigation. *In re William H. Pflaumer & Sons, Inc.,* 53 F.R.D. 464 (E.D. Pa. 1971). That the procedure was proper here is clear. In fact, plaintiff seeks to restrain the U.S. Attorney from presenting the documents to the Grand Jury. Thus, plaintiff seeks to enjoin the Government from making the only legitimate use of the subpoenaed documents that is permissible.

This Court is in agreement with the *Pflaumer* Court. Turning over documents subpoenaed by the Grand Jury to a Government agency that is "expert" in a field in order to facilitate the investigative function of the Grand Jury does not violate Rule 6(e), F.R. Crim. P. The Court makes no comment upon the propriety of injunctive relief even assuming a violation of Rule 6(e) existed.

Both the complaint and the transcript at oral argument reveal an implication that the documents were merely turned over to the United States Attorney without the benefit of plaintiff having appeared before the Grand Jury. The transcript of the Grand Jury proceedings belies such an implication. The plaintiff was, in fact, brought before the Grand Jury. He formally turned over the subpoenaed documents to the Grand Jury in the presence of that body. Plaintiff answered certain questions concerning the documents before the Grand Jury, and refused to answer others.

There can be no question of the right of the United States Attorney under Rule 6(e), F.R. Crim. P. to have materials analyzed by expert consultants whether in government service or private practice, so that he might be enabled to make a proper presentation for the Grand Jury's consideration.

Lawyers, whether employed by government or private clients, are constantly confronted with the problem of dealing with materials outside their expertise. For the lawyer to render his services properly, he must have the assistance of experts, whether in the accounting or tax fields, or in engineering,

fingerprint analysis, medicine or any other pertinent field. In private work, such disclosures do not violate or waive the attorney-client privilege and the matter disclosed remains privileged. So, here, it is the evident intent of the rule that the United States Attorney be enabled to perform his function properly, with such assistance as the needs of the particular case require.

Additionally, plaintiff submits that the Grand Jury subpoena was mere subterfuge in order for the I.R.S. to obtain information. Such an allegation is fanciful. The government here seeks vigorously to proceed with the Grand Jury investigation by presenting the documents before the Grand Jury. It is plaintiff who seeks to enjoin the government from doing so. To hold that the target of a Grand Jury investigation could prevent the submission of evidence to a duly constituted Grand Jury on a bald allegation of subterfuge would perversely hamper the traditional investigative function of the Grand Jury. See *In re April, 1956 term Grand Jury,* 239 F.2d 263 (7th Cir. 1956). Cf. *U.S. v. Calandra,*__U.S.__, 38 L. Ed. 2d 561 (1974).

Count II of the complaint asserts that plaintiff was denied his Fifth Amendment right to equal protection since he was subjected to both administrative investigation as well as a Grand Jury probe. Plaintiff submits that "everyone else" is proceeded against via administrative process. Thus, plaintiff contends that for the government to proceed against a taxpayer by any means other than administrative process pursuant to 26 U.S.C. 7602 amounts to a denial of equal protection. Such an assertion is frivolous and absolutely lacking in merit. Section 7602 was not

intended "to limit the powers of a grand jury to inquire into tax matters." *In re William H. Pflaumer, Inc.*, supra, at 469. See also *In re Goldman*, 331 F. Supp. 509 (W.D. Pa. 1971).

It should be noted that the witness was subpoenaed to produce corporate records; hence, no privilege against self-incrimination was or could be made.

Plaintiff relies on *In re Grand Jury Proceedings* (Scofield), 486 F.2d 85 (3rd Cir. 1973) for the proposition that before any subpoenaed documents are presented to the Grand Jury, the government must submit proofs of relevancy and materiality. Plaintiff's reliance on *Scofield* is misplaced. Scofield involved a refusal to comply with a Grand Jury subpoena. Here, we have compliance. The documents were delivered to the Grand Jury. Plaintiff now seeks to restrain that entity from reviewing documents already in their custody. Further, in *Scofield* the petitioners were subpoenaed to submit handwriting exemplars, fingerprints and mugshots. The substance of the Grand Jury probe was unclear. Here, Plaintiff is acutely aware of the scope of the Grand Jury's inquiry as well as the relevancy of the submitted documents. Such is evidenced by plaintiff's instant complaint seeking to enjoin the Assistant U.S. Attorney from presenting the documents to the Grand Jury. In *Scofield* the relevancy of the requested matter was solely in the hands of the government. In the instant case, plaintiff is as aware as the government of the relevancy of the documents. No preliminary affidavit would be required.

Notwithstanding the foregoing, the Court did require the Assistant U.S. Attorney to file a *Scofield* affidavit. After an *in*

camera review of that affidavit, the court is convinced that the subpoenaed documents are relevant to a legitimate Grand Jury investigation. Thus, if required, *Scofield* has been satisfied.

The government's motion to dismiss the complaint for failure to state a claim will be granted. No costs. SO ORDERED.

May 1, 1974

s/ Vincent P. Biunno, U.S.D.J.

Original to Clerk
Xc: U.S. Attorney's Office
Weiner, Schoifet & Hendler, Esqs.

OPINION OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT

(Filed February 3, 1975)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74-1464

JOSEPH E. SHAMY,

Appellant,

v.

JONATHAN GOLDSTEIN, Acting United States Attorney for the District of New Jersey; FRANK B. PARISI, Special Agent, Internal Revenue Service; and E.H. Klinsman, District Director of Internal Revenue Service of New Jersey

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Appeal from the United States District Court for the District of New Jersey
(Civil Action No. 74-314)

Submitted Under Third Circuit Rule 12(6)
January 10, 1975
Before: ALDISERT, WEIS and GARTH, *Circuit Judges.*

After consideration of all contentions raised by appellant, it is

Opinion for the Court of Appeals for the Third Circuit

JUDGMENT ORDER

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

s/ Aldisert
Circuit Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: January 10, 1975

Certified as a true copy and issued in lieu
of a formal mandate on February 3, 1975.

Test:
s/ Thomas F. Quinn
Clerk, United States Court of
Appeals for the Third Circuit

CONFLICTING OPINIONS

In re Grand Jury Proceedings

In re Jacqueline SCHOFIELD, Witness,

Appellant.

No. 73-1520.

United States Court of Appeals,

Third Circuit.

Argued July 2, 1973.

Decided Sept. 11, 1973.

The United States District Court for the Eastern District of Pennsylvania, Donald W. VanArtsdalen, J., entered order adjudging grand jury witness under subpoena in civil contempt and committing her to custody of United States marshal until such time as she purged herself by furnishing handwriting exemplars and by allowing her fingerprints and photograph to be taken by the government, and witness appealed. The Court of Appeals, Gibbons, Circuit Judge, held that, before district court could adjudge the witness in civil contempt, government would be required to make some preliminary showing by affidavit that each item requested was at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction and not sought primarily for another purpose; and,

unless extraordinary circumstances appeared, the government's supporting affidavit would be required to be disclosed to the witness in a proceeding to enforce subpoena.

Reversed and remanded for further proceedings.

Seitz, Chief Judge, concurred and filed opinion.

* * *

Joseph A. Torregrossa, Philadelphia, Pa., for appellant.

Robert E.J. Curran, U.S. Atty., Walter S. Batty, Jr., Asst. U.S. Atty., Philadelphia, Pa., for appellee.

Before SEITZ, Chief Judge, and GIBBONS and HUNTER, Circuit Judges.

OPINION OF THE COURT

GIBBONS, Circuit Judge.

This is an appeal from an order adjudging the appellant Schofield in civil contempt and committing her to the custody of the United States Marshal until such time as she purges herself by furnishing handwriting exemplars and by allowing her fingerprints and photograph to be taken by the Government. *See* 28 U.S.C. §1826.

On April 5, 1973 Mrs. Schofield was served with a subpoena commanding her to appear at 4042 United States

Courthouse, 9th and Market Streets, Philadelphia, Pa. for the purpose of testifying in a grand jury investigation. As appears on its face, the subpoena, on a standard printed Cr. Form No. 20, was issued by the Office of the Clerk, Eastern District of Pennsylvania, signed by a deputy clerk. As provided in Fed. R. Crim. P. 17(a), it was delivered in blank to the office of the United States Attorney, who filled in the blanks before it was served. The return of service shows that it was served by an F.B.I. agent. *See* 18 U.S.C. §3052. The subpoena is captioned

"United States of America

v.

Grand Jury Investigation."

It discloses that it was issued on the application of the United States. It commands Mrs. Schofield to appear at the time and place designated "to testify in the above-entitled case." It contains no other information about the nature or purpose of the proceeding.

Mrs. Schofield appeared at the designated time and place. She was not asked to testify, but was directed by the United States Attorney (1) to submit handwriting exemplars, and (2) to allow her fingerprints and photograph to be taken. She requested an opportunity to confer with counsel and after so conferring on April 13, 1973 she refused to comply with the same requests made before the grand jury.

In re Grand Jury Proceedings

On April 19, 1973 the United States Attorney made a motion in the district court requesting that it order Mrs. Schofield "to submit and furnish, pursuant to any reasonable requests, examples of her handwriting and/or handprinting; fingerprints; and allow her photograph to be taken." In support of this application the Government represented:

> "1. That JACQUELINE SCHOFIELD was called by the United States on April 13, 1973 to provide handwriting examples, fingerprints and her photograph to the Federal Grand Jury.
>
> 2. That the said JACQUELINE SCHOFIELD did appear before the said Grand Jury and did refuse to comply with the said request.
>
> 3. That the said JACQUELINE SCHOFIELD had no right or privilege, under either the 4th or 5th amendment of the United States Constitution to refuse to comply with said requests."

No other information, aside from legal argument, was furnished to the court in support of the motion. On April 19, 1973, without making any findings of any kind, the district court entered an order

> "that the defendant, Jacqueline Schofield, shall within ten days of the date of this Order present

> herself at the office of the Federal Bureau of Investigation, . . . and shall submit and furnish, pursuant to any reasonable requests, samples of her handwriting and/or handprinting; fingerprints; and shall allow her photograph to be taken. . . ."

The order permitted counsel to be present during her processing by the F.B.I. Mrs. Schofield did not comply with the order, and the United States Attorney obtained from the district court an order directing her to show cause why she should not be adjudged in civil contempt. In support of the order to show cause the United States Attorney showed only the facts set forth above. On the return day the district court determined that Mrs. Schofield had violated the order of April 19, 1973. Without making any other findings the court adjudged her in civil contempt and directed her confinement until she purged herself by submitting to the order. This appeal followed.

At all times during the proceedings in the district court Mrs. Schofield urged that before she be required to comply with the Government's requests (1) the Government state the purpose and necessity for requesting of Mrs. Schofield handwriting exemplars, fingerprints and photographs, and (2) that if the Government has in its possession documents allegedly signed by her, she be permitted to examine them. At all times during the proceedings below, and on this appeal, the Government has taken the position that it need disclose, either to the court or to the witness, no more than appears on the face of the grand jury subpoena.

In re Grand Jury Proceedings

Fed. R. Crim. P. 17(g) provides:

> "CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued. . . ."

The rule makes no distinction between civil and criminal contempts. Thus a recalcitrant witness presumably could be charged with a criminal contempt pursuant to Fed. R. Crim. P. 42(b). Moreover, Rule 17(g) on its face appears to make a subpoena self executing. Title III of the Organized Crime Control Act of 1970, P.L. 91-452, 28 U.S.C. §1826(a), however, provides:

> "Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement . . . until such time as the witness is willing to give such testimony or provide such information."

House Report (Judiciary Committee) No. 91-1549, Sept. 30, 1970 says:

> "Title III is intended to codify present civil contempt practice with respect to recalcitrant witnesses in Federal grand jury and court proceedings." 2 U.S. Code Cong. & Ad. News, 91st Cong., 2d Sess. 4008 (1970).

Thus, for a civil contempt the two-step procedure of a subpoena followed by a court order is required. A subpoena is not, for civil contempt purposes, self executing. Moreover, the witness may be held in contempt only when his refusal is "without just cause." This appeal, then, requires a determination of the procedural steps which must be followed and the factual showing which must be made before a district court may adjudge a witness in civil contempt pursuant to 28 U.S.C. §1826(a) and Fed. R. Crim. P. 17(g).

The Government, citing United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764, 35 L. Ed.2d 67 (1973), and United States v. Mara, 410 U.S. 19, 93 S. Ct. 774, 35 L. Ed. 2d 99 (1973), contends that the district court should not make, or permit the witness to make, any inquiry, or require the Government to make any showing, beyond the facts set forth above. The district court apparently agreed.[1] That holding gives much too broad a compass to the holdings in *Dionisio* and *Mara*. Those cases did not involve the district court's supervisory power over the proper use of its process in a grand jury proceeding, the supervisory power of this court over the manner in which the district court supervises the proper use of its process, or the substantive and procedural law of civil contempt.

1. No opinion was filed by the district court.

In re Grand Jury Proceedings

In *Dionisio* each grand jury witness was advised that he was a potential defendant in a criminal prosecution. Each was asked to examine a transcript of a lawfully intercepted wire conversation and to read the transcript into a recording device. Dionisio refused to do so, asserting that such a procedure violated his rights under the fourth and fifth amendments. The Government's petition for enforcement established that the voice exemplars were essential and necessary to the grand jury investigation and that they would be used solely as a standard of comparison in order to determine whether or not the witness was the person whose voice was intercepted. The Seventh Circuit, relying on Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed.2d 676 (1969), held that before a grand jury subpoena could issue for such a purpose there must be preliminary showing in open court of probable cause for its issuance. In re Dionisio, 442 F.2d 276 (7th Cir. 1971). *Compare* the above *with* United States v. Doe, 457 F.2d 895 (2d Cir. 1972). In *Mara* the Government sought handwriting exemplars. Its enforcement petition, presented to the court *ex parte*, and supported by an affidavit of an F.B.I. agent setting forth the basis for seeking the exemplars, established that the handwriting exemplars were essential and necessary to the grand jury investigation and would be used solely to determine whether Mara was the author of certain writings. The Seventh Circuit reversed. Relying on its *Dionisio* holding it held that an *ex parte* proceeding was inadequate[2] and that in addition to the need for comparison the Government must establish that exemplars were unavailable from another source. In re September 1971 Grand Jury (Richard J. Mara), 454 F.2d 580 (7th Cir. 1971). In both

2. *Compare* Fed.R.Crim.P. 41(c).

cases the Supreme Court reversed. The holding in *Dionisio* is clear:

> "Since the Court of Appeals found an unreasonable search and seizure where none existed, and imposed a preliminary showing of reasonableness where none was required, its judgment is reversed and this case is remanded to that Court for further proceedings consistent with this opinion." 410 U.S. at 18, 93 S. Ct. at 773.

Its holding in *Mara* reiterates that in *Dionisio*. Both hold that the fourth amendment does not require any preliminary showing for the issuance of a grand jury subpoena, either to compel testimony, or to compel production of voice or handwriting exemplars. Neither, however, involves any question as to the propriety of the grand jury's investigation, the legitimacy of the purpose for issuing the subpoena, or any nonconstitutional objection to its enforcement. Indeed Justice Stewart's opinion for the Court in *Dionisio* quite carefully circumscribes its holding by explicitly reiterating the power of the district courts to control the use of grand jury subpoenas referred to in Justice Powell's concurring opinion in Branzburg v. Hayes, 408 U.S. 665, 709-710, 92 S. Ct. 2646, 33 L. Ed.2d 626 (1972). The issues raised by this appeal were not presented to or passed upon by the Supreme Court in *Dionisio* and *Mara*.

[1-3] In considering those issues it is well to start with some fundamental propositions. First, although federal grand juries

are called into existence by order of the district court, Fed. R. Crim. P. 6(a); 18 U.S.C. §3331, they are "basically . . . a law enforcement agency." United States v. Cleary, 265 F.2d 459, 461 (2d Cir.), cert. denied, 360 U.S. 936, 79 S. Ct. 1458, 3 L. Ed.2d 1548 (1959). They are for all practical purposes an investigative and prosecutorial arm of the executive branch of government. *See* 8 J. Moore, Federal Practice, par. 6.02[1], [6] (2d ed. Cipes ed. 1972). Second, although like all federal court subpoenas grand jury subpoenas are issued in the name of the district court over the signature of the clerk, they are issued pro forma and in blank to anyone requesting them. Fed. R. Crim. P. 17(a). The court exercises no prior control whatsoever upon their use. Third, although grand jury subpoenas are occasionally discussed as if they were the instrumentalities of the grand jury, they are in fact almost universally instrumentalities of the United States Attorney's office or of some other investigative or prosecutorial department of the executive branch. Grand jury subpoenas then, when they are brought before the federal courts for enforcement, for all practical purposes are exactly analogous to subpoenas issued by a federal administrative agency on the authority of a statute,[3] without any prior judicial control. In ICC v. Brimson, 154 U.S. 447, 485, 14 S. Ct. 1125, 38 L. Ed. 1047 (1894), the Supreme Court stated that an administrative agency could not self enforce its subpoenas by fine or imprisonment, thereby insulating them from judicial review, but must seek a judicial enforcement order. Penfield Co. v. SEC, 330 U.S. 585, 67 S. Ct. 918, 91 L. Ed. 1117 (1947), recognizes that civil contempt is the appropriate means for compelling obedience to such an enforcement order. In Oklahoma Press Publishing Co. v.

3. *See, e.g.*, 15 U.S.C. §50 (Federal Trade Commission); 15 U.S.C. §78ff (Securities & Exchange Commission); 26 U.S.. §7602 (Internal Revenue Service); 49 U.S.C. §20 par. 7 (Interstate Commerce Commission).

Walling, 327 U.S. 186, 216, 66 S. Ct. 494, 90 L. Ed. 614 (1946), the Court indicated that an administrative subpoena and a grand jury subpoena performed essentially the same function, and stated:

> "The result therefore sustains the Administrator's position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be 'limited . . . by . . . forecasts of the probable result of the investigation . . .' 282; cf. Hale v. Henkel, 201 U.S. 43. Nor is the judicial function either abused or abased, as has been suggested, by leaving to it the determination of the important questions which the Administrator's position concedes the courts may decide.[57] 327 U.S. 186, 216-217, 66 S. Ct. 494-509 (footnotes 55-56 omitted).

57. The issues of authority to conduct the investigation, relevancy of the materials sought, and breadth of the demand are neither minor nor ministerial matters. . . ."

The enforcement mechanism of 28 U.S.C. §1826(a) is the same as that for the typical administrative subpoena. There is no indication that Congress intended the role of the court to be different in one case from the other. And the federal courts have never lent their enforcement machinery to an executive branch

investigative body in the manner of a rubber stamp. Since the *Brimson* case it has been clear that in passing on the application for enforcement of a subpoena the court acts *judicially* in a case or controversy. *See* 154 U.S. at 489, 14 S. Ct. 1125. It is true that orders enforcing administrative subpoenas are considered final and appealable, ICC v. Brimson, *supra,* whereas a grand jury witness must be adjudged in contempt to obtain an appealable order. *E.g.,* Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947); Cobbledick v. United States, 309 U.S. 323, 60 S. Ct. 540, 84 L. Ed. 783 (1940). But Gelbard v. United States, 408 U.S. 41, 92 S. Ct. 2357, 33 L. Ed.2d 179 (1972), makes clear that a court's determination under 28 U.S.C. §1826(a) of the existence or nonexistence of just cause for refusing to obey a subpoena entails the same full judicial consideration as in the administrative subpoena cases. Indeed *Gelbard* holds that because a grand jury witness does not have an opportunity, prior to his appearance, to file appropriate motions addressed to his subpoena, 28 U.S.C. §1826(a) must be construed as affording him the opportunity of presenting all defenses properly available to him, 408 U.S. at 59-60, 92 S. Ct. 2357.

[4-8] Among the defenses which may be presented in resisting a subpoena are the obvious constitutional defenses of unreasonable search and seizure, *e.g.,* Hale v. Henkel, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1906); *cf.* Gelbard v. United States, *supra,* and self incrimination, *e.g.,* Hoffman v. United States, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). But many nonconstitutional defenses also are available, including undue breadth, *e.g.,* Brown v. United States, 276 U.S. 134, 48 S.

Ct. 288, 72 L. Ed. 500 (1928), improper inclusion of irrelevant information, *e.g.*, McGarry v. S.E.C., 147 F.2d 389 (10th Cir. 1945). lack of authority to conduct the investigation in issue, *e.g.*, Electric Bond & Share Co. v. S.E.C., 303 U.S. 419, 58 S. Ct. 766, 82 L. Ed. 526 (1938), and improper issuance of a given subpoena, *e.g.*, ICC v. Goodrich Transit Co., 224 U.S. 194, 32 S. Ct. 436, 56 L. Ed. 729 (1912). If the court concludes that an administrative subpoena has been issued for the purpose of developing a criminal case it will decline enforcement. *See, e.g.*, Donaldson v. United States, 400 U.S. 517, 532-533, 91 S. Ct. 534, 27 L. Ed.2d 580 (1971); Reisman v. Caplin, 375 U.S. 440, 449, 84 S. Ct. 508, 11 L. Ed.2d 459 (1964); United States v. Salter, 432 F.2d 697, 700 (1st Cir. 1970); United States v. Roundtree, 420 F.2d 845, 847 (5th Cir. 1969); United States v. DeGrosa, 405 F.2d 926, 928 (3d Cir. 1969), cert. denied, 394 U.S. 973, 89 S. Ct. 1465, 22 L. Ed.2d 753 (1969); United States v. O'Connor, 118 F. Supp. 248, 250 (D. Mass. 1953). In the grand jury context a court will not enforce a subpoena if its purpose is to gather evidence for a pending criminal indictment or information. *See, e.g.*, Beverly v. United States, 468 F.2d 732, 743 (5th Cir. 1972); United States v. George, 444 F.2d 310, 314 (6th Cir. 1971); In re Grand Jury Investigation (General Motors Corp.), 32 F.R.D. 175, 181 (S.D.N.Y.), appeal dismissed, 318 F.2d 533 (2d Cir.), cert. denied, 375 U.S. 802, 84 S. Ct. 25, 11 L. Ed.2d 37 (1963); United States v. Pack, 150 F. Supp. 262, 263 (D. Del. 1957); *cf.* United States v. Fisher, 455 F.2d 1101, 1104 (2d Cir. 1972). A court will not enforce a grand jury subpoena if the grand jury is not pursuing an investigation in good faith or is motivated by a desire to harass an individual. *See* United States v. Dionisio, 410 U.S. at 10, 93 S. Ct. 764, citing Branzburg v.

Hayes, *supra;* United States v. Mara, 410 U.S. 43 n.5, 47 n.9, 93 S. Ct. 774 (Marshall, J., dissenting); Branzburg v. Hayes, 408 U.S. at 707-708, 709-710, 92 S. Ct. 2646 (Powell, J., concurring); Hale v. Henkel, 201 U.S. at 65, 26 S. Ct. 370; Bursey v. United States, 466 F.2d 1059, 1080 (9th Cir. 1972); United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970), cert. denied, 403 U.S. 904, 91 S. Ct. 2202, 29 L. Ed.2d 679 (1971). The court will not enforce a grand jury subpoena used only to compel a witness to appear in the United States Attorney's office. Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954). Although we have described these defenses to an enforcement proceeding as nonconstitutional, improper use of a subpoena does have constitutional overtones, for as Judge Friendly observed in United States v. Doe, 405 F.2d 436, 438 (2d Cir. 1968), "[e]ven though evidence is not within a testimonial privilege, the due process clause protects against the use of excessive means to obtain it."

It is clear, then, that as a matter of substantive law the role of the district court in a civil proceeding looking to the enforcement of a subpoena — any subpoena — is not so circumscribed as the Government here suggests. The limited role that the Government would have the district court play in the enforcement process is illuminated by a colloquy which took place at the oral argument of this appeal. Hypothesizing an instance in which a United States attorney concluded that it might be in the interest of national security to have in the government files mug shots, fingerprints and handwriting exemplars of all members of a radical student organization at a local university, and proceeded to obtain them by the use of

subpoenas identical to that issued here a member of the court asked the United States attorney if the district court's inquiry in an enforcement proceeding should be as limited as he suggested. As might be expected, the reply was that no United States attorney ever would do such a thing — which perhaps is true — but that in order to prevent delay in the grand jury process the scope of inquiry in all cases should be the same. Clearly the Supreme Court in *Dionisio* and *Mara* did not so intend, for if it did it overruled *sub silentio* a large body of established caselaw in which the courts have sought to confine the use of subpoenas within appropriate bounds.

[9, 10] At the same time we recognize that as with administrative subpoenas, United States v. Powell, 379 U.S. 48, 58, 85 S. Ct. 248, 13 L. Ed.2d 112 (1964), a presumption of regularity attaches to the grand jury's proceedings, and hence to a grand jury subpoena. *See, e.g.,* Beverly v. United States, *supra.* Given that presumption, the party objecting to enforcement has the burden of making some showing of irregularity. Usually, however, and almost universally in the case of grand jury subpoenas, all the relevant information is in the hands of the government enforcement agency. Here the administrative subpoena cases give guidance on that problem, for courts have recognized that a party seeking to show an abuse of the subpoena process can use discovery proceedings to meet his burden. *See* United States v. Newman, 441 F.2d 165 (5th Cir. 1971), United States v. Salter, 432 F.2d at 700; United States v. Roundtree, 405 F.2d at 852. Complicating the discovery problem in grand jury subpoena cases, however, is Fed. R. Crim. P. 6(e), providing for secrecy of matters occurring before the grand jury.

The issues in this case, then, relate not to the district court's substantive powers in an enforcement proceeding under 28 U.S.C. §1826(a), but to the procedures appropriate to such a proceeding. That section applies both to court proceedings and to grand jury proceedings. Obviously the enforcing court has greater latitude in the matter of discovery in cases relating to the enforcement of subpoenas for proceedings as to which Rule 6(e) does not apply. On the other hand, because such proceedings are not secret it may be argued that in such cases the party resisting enforcement should be required to make a greater affirmative showing of the likelihood of abuse of process before he is afforded discovery. Certainly the fact of grand jury secrecy suggests that the party seeking enforcement of a grand jury subpoena be required to make some minimum showing of the existence of a proper purpose before it can trigger the enforcement machinery of the judicial branch.

The few courts which have considered the matter have not acted uniformly. In George v. United States, 319 F. Supp. 598, 599 (E.D. Mich. 1970), aff'd. 444 F.2d 310, 314 (6th Cir. 1971), a witness subpoenaed before a grand jury sought to enjoin his interrogation on the ground that the Government was using the grand jury as a means of obtaining discovery for use in a pending criminal case. The district court obtained from the Government an affidavit disclosing the purpose of the grand jury's investigation, which it examined *in camera.* Based on the *in camera* examination the court concluded that the investigation was aimed at returning a new indictment which would supersede the one previously returned. In In re Grand Jury Subpoena to Central States, 225 F. Supp. 923 (N.D. Ill.

1964), on a motion to quash subpoenas duces tecum as unreasonable and harassing, the district court held an *in camera* meeting with the grand jury to determine the nature and scope of its investigation. The district court opinion denying the motion to quash states:

> "In the interest of justice and pursuant to my aforementioned supervisory power I have, as I indicated I would at the close of the oral arguments, met and conferred with the August 1963 Grand Jury. My purpose in holding this *in camera* meeting was and is to determine the intended scope and purpose behind investigations here challenged. I shall in the future and to the extent I deem necessary, continue meeting with this Grand Jury to inquire as to their progress. If it should ever become apparent to me that the Grand Jury is functioning improperly or abusing the rights of those appearing before it I will of course take necessary and appropriate action. Moreover, should petitioners at any time in the future feel that subsequently issued subpoenas or grand jury conduct are oppressive and abusive they are welcome to come in by motion, as they have here, and again, to the extent of the law set forth in this memorandum, seek the aid of this Court." 225 F. Supp. at 925-926.

[11-13] We need not in this case lay down inflexible procedures to govern all challenges to enforcement of any grand

jury procedure, for the information here sought is both limited and unique. The Government wants only handwriting exemplars, fingerprints and a mug shot. It has no general right to any of these things. Authority for obtaining them exists, if at all, solely because they are somehow relevant to the grand jury's investigation of an offense falling within its jurisdiction. In view of the fact that information which would justify obtaining the handwriting exemplars, fingerprints, and a mug shot, is in the Government's sole possession, we think it reasonable that the Government be required to make some preliminary showing by affidavit that each item is at least relevant to an investigation being conducted by the grand jury and properly within its jurisdiction, and is not sought primarily for another purpose. We impose this requirement both pursuant to the federal courts' supervisory power over grand juries and pursuant to our supervisory power over civil proceedings brought in the district court pursuant to 28 U.S.C. §1826(a). We do not rule out the possibility that the Government's affidavit may be presented to the court *in camera,* but we do hold that Rule 6(e) does not require *in camera* presentation. There is a difference between disclosing "matters occurring before the grand jury" and disclosing that the matters requested by the subpoena are relevant to an investigation it is conducting. Thus unless extraordinary circumstances appear, the nature of which we cannot anticipate, the Government's supporting affidavit should be disclosed to the witness in the enforcement proceeding. *See* United States v. Dionisio, *supra.* If after such disclosure the witness makes application to the district court for additional discovery in the enforcement proceeding the court must in deciding that request weigh the quite limited scope of an inquiry

into abuse of the subpoena process, and the potential for delay, against any need for additional information which might cast doubt upon the accuracy of the Government's representations. Finally, it may appropriately be noted that since the Government has no general right to retain files of handwriting exemplars, fingerprints and mug shots, any enforcement order may properly, on the witness' request, provide that if these materials do not prove to be relevant to the grand jury's inquiry, or to a resulting indictment, they be returned to the witness or destroyed.

The judgment finding Mrs. Schofield in contempt will be reversed and the case will be remanded to the district court for further proceedings consistent with this opinion.

SEITZ, Chief Judge (concurring).

I agree with the opinion of the court that in order to invoke the district court's powers to enforce obedience to a grand jury subpoena, the government must initially make by affidavit or otherwise some minimal sworn showing of a proper purpose. Indeed, in both *Mara* and *Dionisio,* the government did in fact make a showing of a proper purpose, although it is unclear from the factual situation in *Dionisio* whether the showing there was sworn.

It seems to me that such a minimal requirement is almost indispensable if citizens are to be afforded minimum protection against the possible arbitrary exercise of power by a prosecutor through use of the grand jury machinery. See Campbell,

Eliminate the Grand Jury, 64 J. Crim. Law & Criminology 174 (1973). Nor do I believe the minimal showing requirement here imposed is incompatible with *Dionisio* and *Mara.*

I also agree that the government showing should be disclosed to the witness unless the court finds a compelling reason for nondisclosure. I believe the government's disclosure, if the district court is satisfied as to its sufficiency, cannot be made the subject of an adversary hearing by the witness. Such a hearing would lead to the type of mini-hearing which the Supreme Court condemned in *Dionisio.* I emphasize my position on this point because if I read the opinion of the court correctly, it does not negate the possibility that the minimal showing of proper purpose can be factually litigated by the witness.

Since the government here made no showing of a proper purpose, the judgment should be reversed without prejudice to the government's right to renew its petition for enforcement accompanied by the requisite showing. If this is done, the enforcement order will follow unless the witness raises and establishes some properly cognizable legal defense. Certainly, it is clear her Fourth and Fifth Amendment claims would not be valid defenses in view of *Dionisio* and *Mara.*

I therefore concur in the reversal of the finding of contempt.

* * *

United States v. Dionisio

SYLLABUS BY REPORTER OF DECISION

A grand jury subpoenaed about 20 persons, including respondent, to give voice exemplars for identification purposes. Respondent, on Fourth and Fifth Amendment grounds, refused to comply. The District Court rejected both claims and adjudged respondent in contempt. The Court of Appeals agreed in rejecting respondent's Fifth Amendment claim but reversed on the ground that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar and that here the proposed "seizures" would be unreasonable because of the large number of witnesses subpoenaed to produce the exemplars. *Held:*

1. The compelled production of the voice exemplars would not violate the Fifth Amendment privilege against compulsory self-incrimination, since they were to be used only for identification purposes, and not for the testimonial or communicative content of the utterances.

2. Respondent's Fourth Amendment claim is also invalid.

(a) A subpoena to compel a person to appear before a grand jury does not constitute a "seizure" within the meaning of the Fourth Amendment, and the fact that many others besides respondent were ordered to give voice recordings did not render the subpoena unconstitutional. Davis v. Mississippi, 394 US 721, 22 L Ed 2d 676, 89 S Ct 1394, distinguished.

(b) The grand jury's directive to make the voice recording infringed no valid Fourth Amendment interest.

(c) Since neither the summons to appear before the grand jury nor its directive to give a voice exemplar contravened the Fourth Amendment, the Court of Appeals erred in requiring a preliminary showing of reasonableness before respondent could be compelled to furnish the exemplar. 442 F 2d 276, reversed and remanded.

Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and White, Blackmun, Powell, and Rehnquist, JJ., joined. Brennan, J., filed an opinion concurring in part and dissenting in part, post, p 22, 35 L Ed 2d p 82, Douglas, J., post, p 23, 35 L Ed 2d p 82, and Marshall, J., post, p 31, 35 L Ed 2d p 87, filed dissenting opinions.

Appearances of Counsel

Philip A. Lacovara argued the cause for petitioner.
John Powers Crowley argued the cause for respondent.
Brief of Counsel, p 723, infra.

Opinion of the Court

[410 U S 2]

Mr. Justice Stewart delivered the opinion of the Court.

A special grand jury was convened in the Northern District of Illinois in February 1971, to investigate possible violations of

federal criminal statutes relating to gambling. In the course of its investigation, the grand jury received in evidence certain voice recordings that had been obtained pursuant to court orders.[1]

[410 U S 3]

The grand jury subpoenaed approximately 20 persons, including the respondent Dionisio, seeking to obtain from them voice exemplars for comparison with the recorded conversations that had been received in evidence. Each witness was advised that he was a potential defendant in a criminal prosecution. Each was asked to examine a transcript of an intercepted conversation, and to go to a nearby office of the United States Attorney to read the transcript into a recording device. The witnesses were advised that they would be allowed to have their attorneys present when they read the transcripts. Dionisio and other witnesses refused to furnish the voice exemplars, asserting that these disclosures would violate their rights under the Fourth and Fifth Amendments.

1. The court orders were issued pursuant to 18 USC § 2518 [18 USCS § 2518], a statute authorizing the interception of wire communications upon a judicial determination that "(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter [including the transmission of wagering information]; (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

The Government then filed separate petitions in the United States District Court to compel Dionisio and the other witnesses to furnish the voice exemplars to the grand jury. The petitions stated that the exemplars were "essential and necessary" to the grand jury investigation, and that they would "be used solely as a standard of comparison in order to determine whether or not the witness is the person whose voice was intercepted . . . ."

Following a hearing, the District Judge rejected the witnesses' constitutional arguments and ordered them to comply with the grand jury's request. He reasoned that voice exemplars, like handwriting exemplars or fingerprints, were not testimonial or communicative evidence, and that consequently the order to produce them would [410 U S 4] not compel any witness to testify against himself. The district judge also found that there would be no Fourth Amendment violation, because the grand jury subpoena did not itself violate the Fourth Amendment, and the order to produce the voice exemplars would involve no unreasonable search and seizure within the proscription of that Amendment:

> "The witnesses are lawfully before the grand jury pursuant to subpoena. The Fourth Amendment prohibition against unreasonable search and seizure applies only where identifying physical characteristics, such as fingerprints, are obtained as a result of unlawful detention of a suspect, or when an intrusion into the body, such as a blood test, is undertaken without a warrant, absent an emergency situation. E. g., Davis v. Mississippi,

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394 U S 721, 724-728 [22 L Ed 2d 676, 89 S Ct 1394] (1969); Schmerber v. California, 384 U S 757, 770-771 [16 L Ed 2d 908, 86 S Ct 1826] (1966)."[2]

When Dionisio persisted in his refusal to respond to the grand jury's directive, the District Court adjudged him in civil contempt and ordered him committed to custody until he obeyed the court order, or until the expiration of 18 months.[3]

The Court of Appeals for the Seventh Circuit reversed. 442 F 2d 276. It agreed with the District Court in rejecting the Fifth Amendment claims,[4] but concluded that to compel the voice recordings would violate the Fourth Amendment. In the court's view, the grant [410 U S 5] jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars."Id., at 280. The court found that the Fourth Amendment applied to grand jury process, and that "under the fourth amendment law enforcement officials may not compel the production of physical evidence absent a showing of the

2. The decision of the District Court is unreported.

3. The life of the special grand jury was 18 months, but could be extended up to an additional 18 months. 18 USC § 3331 [18 USCS § 3331].

4. The court also rejected the argument that the grand jury procedure violated the witnesses' Sixth Amendment right to counsel. It found the contention particularly without merit in view of the option afforded the witnesses to have their attorneys present while they made the voice recordings. 442 F2d 276, 278.

reasonableness of the seizure. Davis v. Mississippi, 394 U S 721 . . . [22 L Ed 2d 676, 89 S Ct 1394.]." Ibid.

In Davis this Court held that it was error to admit the petitioner's fingerprints into evidence at his trial for rape, because they had been obtained during a police detention following a lawless wholesale roundup of the petitioner and more than 20 other youths. Equating the procedures followed by the grand jury in the present case to the fingerprint detentions in Davis, the Court of Appeals reasoned that "[t]he dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in Davis." Id. at 281.

[1] In view of a clear conflict between this decision and one in the Court of Appeals for the Second Circuit,[5] we granted the Government's petition for certiorari. 406 US 956, 32 L Ed 2d 343, 92 S Ct 2056.

I

[2, 3] The Court of Appeals correctly rejected the contention that the compelled production of the voice exemplars would violate the Fifth Amendment. It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by [410 US 6] the privilege against compulsory self-incrimination. In Holt v. United States, 218 US

5. United States v. Doe (Schwartz), 457 F2d 895 (affirming civil contempt judgment against grand jury witness for refusal to furnish handwriting exemplars).

245, 252, 54 L Ed 1021, 31 S Ct 2, Mr. Justice Holmes, writing for the Court, dismissed as an "extravagant extension of the Fifth Amendment" the argument that it violated the privilege to require a defendant to put on a blouse for identification purposes. He explained that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." Id, at 252-253, 54 L Ed 1021.

More recently, in Schmerber v. California, 384 US 757, 16 L Ed 2d 908, 86 S Ct 1826 we relied on Holt, and noted that:

> "Both federal and state courts have usually held that [the privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but the compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." Id., at 764, 16 L Ed 2d 908 (footnote omitted).

The Court held that the extraction and chemical analysis of a blood sample involved no "shadow of testimonial compulsion

upon or enforced communication by the accused." Id., at 765, 16 L Ed 2d 908.

These cases led us to conclude in Gilbert v. California, 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951 that handwriting exemplars were not protected by the privilege against compulsory self-incrimination. While "[O]ne's voice and handwriting are, of course, means of communication," we held that a "mere handwriting exemplar, in contrast to the content of what [410 US 7] is written, like the voice or body itself, is an identifying physical characteristic outside its protection." Id., at 266-267, 18 L Ed 2d 1178. And similarly in United States v. Wade, 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926 we found no error in compelling a defendant accused of bank robbery to utter in a lineup words that had allegedly been spoken by the robber. The accused there was "required to use his voice as an identifying physical characteristic, not to speak his guilt." Id., at 222-223, 18 L Ed 2d 1149.

Wade and Gilbert definitively refute any contention that the compelled production of the voice exemplars in this case would violate the Fifth Amendment. The voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said.[6]

6. The Court of Appeals for the Seventh Circuit appears to have recanted somewhat from its clear and correct holding in the present case that the compelled production of voice exemplars would not violate the privilege against compulsory self-incrimination. In subsequently explaining that holding, the Court qualified it:

> "Nevertheless, the witnesses were potential defendants, and since the purpose of the voice exemplars was to identify the voices

(Cont'd)

[410 US 8]

[4] The Court of Appeals held that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar, and that in this case the proposed "seizures" of the voice exemplars would be unreasonable because of the large number of witnesses summoned by the grand jury and directed to produce such exemplars. We disagree.

[5] The Fourth Amendment guarantees that all people shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Any Fourth Amendment violation in the present setting must rest on a lawless governmental intrusion upon the privacy of "persons"

(Cont'd)

obtained by FBI agents pursuant to a court-ordered wiretap, the self-incriminatory impact of the compelled exemplars was clear. Thus the compelled exemplars were at odds with the spirit of the Fifth Amendment. Because the Fifth Amendment illuminates the Fourth (see . . . Boyd v. United States [116 US 616 [29 L Ed 746, 6 S Ct 524]] . . .), the Fourth Amendment violation appears more readily than where immunity is granted, and in Dionisio immunity had not yet been granted." Fraser v. United States, 452 F2d 616, 619, n 5. But Boyd dealt with the compulsory production of private books and records, testimonial sources, a circumstance in which the "Fourth and Fifth Amendments run almost into each other." 116 US, at 630, 29 L Ed 746.

In the present case, by contrast, no Fifth Amendment interests are jeopardized; there is no hint of testimonial compulsion. The Court of Appeals' subsequent attempt to read the "spirit of the Fifth Amendment" into the production of voice exemplars cannot survive comparison with Wade, Gilbert, and Schmerber.

rather than on interference with "property relationships or private papers." Schmerber v. California, 384 US, at 767, 16 L Ed 2d 908; see United States v. Doe (*Schwartz*), 457 F2d 895, 897. In Terry v. Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, the Court explained the protection afforded to "persons" in terms of the statement in Katz v. United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507, that "the Fourth Amendment protects people, not places," id., at 351, 19 L Ed 2d 576 and concluded that "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." Terry v. Ohio, supra, at 9, 20 L Ed 2d 889.

[6] As the Court made clear in Schmerber, supra, the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels — the "seizure" of the "person" necessary to bring him into contact with government agents, see Davis v. Mississippi, 394 US 721, 22 L Ed 2d 676, 89 S Ct 1394, and the subsequent search for and seizure of the evidence. In Schmerber, we found the initial seizure of the accused justification as a lawful arrest, and the subsequent seizure of the blood sample from his body reasonable in light of the exigent circumstances. [410 US 9] And in Terry, we concluded that neither the initial seizure of the person, an investigatory "stop" by a policeman, nor the subsequent search, a patdown of his outer clothing for weapons constituted a violation of the Fourth and Fourteenth Amendments. The constitutionality of the compulsory production of exemplars from a grand jury witness necessarily turns on the same dual inquiry—whether either the initial

compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable "seizure" within the meaning of the Fourth Amendment.

[7, 8] It is clear that a subpoena to appear before a grand jury is not a "seizure" in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome. Last Term we again acknowledged what has long been recognized,[7] that "[c]itizens generally are not constitutionally immune from grand jury subpoenas . . . . " Branzburg v. Hayes, 408 US 665, 682, 33 L Ed 2d 626, 92 S Ct 2646. We concluded that:

> "[A]lthough the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, United States v. Bryan, 339 US. at 331, 94 L Ed 884; Blackmer v. United States, 284 US 421, 438, 76 L Ed 375, 52 S Ct 252 (1932); 8 J. Wigmore, Evidence §2192 (McNaughton rev 1961), is particularly applicable to grand jury proceedings." Id., at 688, 33 L Ed 2d 626.

[9, 10] These are recent reaffirmations of the historically grounded obligations of every person to appear and give [410

7. See generally Kastigar v. United States, 406 US 441, 443-444, 32 L Ed 2d 212, 92 S Ct 1653; Blair v United States, 250 US 273, 279-281, 63 L Ed 979, 39 S Ct 468; 8 J. Wigmore, Evidence §2191 (J. McNaughton rev 1961).

US 10] his evidence before the grand jury. "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." Blair v. United States, 250 US 273, 281, 63 L Ed 979, 39 S Ct 468. See also Garland v Torre, 259 F2d 545, 549. And while the duty may be "onerous" at times, it is "necessary to the administration of justice." Blair v. United States, supra, at 281, 63 L Ed 979.[8]

[11, 12] The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" in more than civic obligation. For, as Judge Friendly wrote for the Court of Appeals for the Second Circuit:

> "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court." United States v. Doe (Schwartz) 457 F2d, at 898.

Thus, the Court of Appeals for the Seventh Circuit correctly recognized in a case subsequent to the one now before us, that a "grand jury subpoena to testify is not that kind of governmental intrusion on privacy against which the Fourth Amendment

[10] 8. The obligation to appear is no different for a person who may himself be the subject of the grand jury inquiry. See United States v. Doe (Schwartz),457 F2d, at 898; United States v. Winter, 348 F2d 204, 207-208.

affords protection, once the Fifth Amendment is satisfied." Fraser v. United States, 452 F2d 616, 620; cf. United States v. Weinberg, 439 F2d 743, 748-749.

[410 US 11]

[13] This case is thus quite different from Davis v. Mississippi, supra, on which the Court of Appeals primarily relied. For in Davis it was the initial seizure — the lawless dragnet detention — that violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints. We noted that "[i]nvestigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention." 394 US, at 726, 22 L Ed 2d 676, and we left open the question whether, consistently with the Fourth and Fourteenth Amendments, narrowly circumscribed procedures might be developed for obtaining fingerprints from people when there was no probable cause to arrest them. Id., at 728, 22 L Ed 2d 676.[9] Davis is plainly inapposite to a case where the initial restraint does not itself infringe the Fourth Amendment.

[14, 15] This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. The grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and

[13] 9. Judge Weinfeld correctly characterized Davis as "but another application of the principle that the Fourth Amendment applies to all searches and seizures of the person no matter what the scope or duration. It held that in the circumstances there presented the detention for the sole purpose of fingerprinting was in violation of the Fourth Amendment ban against unreasonable search and seizure." Thom v. New York Stock Exchange, 306 F Supp 1002, 1007 (footnote omitted). See also Allen v. Cupp, 426 F2d 756, 760.

records that would incriminate him. See Boyd v. United States, 116 US 616, 633-635, 29 L Ed 746, 6 S Ct 524.[10] The Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping in its terms "to be regarded as reasonable." [410 US 12] Hale v. Henkel, 201 US 43, 76, 50 L Ed 652, 26 S Ct 370; cf. Oklahoma Press Publishing Co. v. Walling, 327 US 186, 208, 217, 90 L Ed 614, 66 S Ct 494, 166 alr 531. And last Term, in the context of a First Amendment claim, we indicated that the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." Branzburg v. Hayes, 408 US, at 707-708, 33 L Ed 2d 626. See also, id., at 710, 33 L Ed 2d 626 (Powell, J., concurring).

But we are here faced with no such constitutional infirmities in the subpoena to appear before the grand jury or in the order to make the voice recordings. There is, as we have said, no valid Fifth Amendment claim. There was no order to produce private books and papers, and no sweeping subpoena duces tecum. And even if Branzburg be extended beyond its First Amendment moorings and tied to a more generalized due process concept,

10. While Boyd was concerned with a motion to produce invoices at a forfeiture trial, the Court treated it as the equivalent of a subpoena duces tecum, and Hale v. Henkel, 201 US 43, 76, 50 L Ed 652, 26 S Ct 370, applied Boyd in the context of a grand jury subpoena.

there is still no indication in this case of the kind of harassment that was of concern there.

[4, 16-19] The Court of Appeals found critical significance in the fact that the grand jury had summoned approximately 20 witnesses to furnish voice exemplars.[11] We think that fact is basically irrelevant to the constitutional issues here. The grand jury may have been attempting to [410 US 13] identify a number of voices on the tapes in evidence, or it might have summoned the 20 witnesses in an effort to identify one voice. But whatever the case, "[a] grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed. . . ." United States v. Stone, 429 F2d 138, 140. See also Wood v. Georgia, 370 US 375, 392, 8 L Ed 2d 569, 82 S Ct 1364. As the Court recalled last Term, "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad." Branzburg v. Hayes, supra, at 688, 33 L Ed 2d 626.[12] The grand jury may well find it desirable to call

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[16] 11. As noted above, supra, at 11, 35 L Ed 2d at 77, there is no valid comparison between the detentions of the 24 youths in Davis, and the grand jury subpoenas of the witnesses here. While the dragnet detentions by the police did constitute substantial intrusions into the Fourth and Fourteenth Amendment rights of each of the youths in Davis, no person has a justifiable expectation of immunity from a grand jury subpoena.

[18] 12. "[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if

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numerous witnesses in the course of an investigation. It does not follow that each witness may resist a subpoena on the ground that too many witnesses have been called. Neither the order to Dionisio to appear, nor the order to make a voice recording, was rendered unreasonable by the fact that many others were subjected to the same compulsion.

[20] But the conclusion that Dionisio's compulsory appearance before the grand jury was not an unreasonable "seizure" is the answer to only the first part of the Fourth Amendment inquiry here. Dionisio argues that the grand jury's subsequent directive to make the voice recording was itself an infringement of his rights [410 US 14] under the Fourth Amendment. We cannot accept that argument.

[21, 22] In Katz v. United States, supra, we said that the Fourth Amendment provides no protection for what "a person knowingly exposes to the public, even in his own home or office. . . ." 389 US, at 351, 19 L Ed 2d 576. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world. As the Court of Appeals for the Second Circuit stated:

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there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. Hendricks v. United States, 223 US 178, 184 [56 L Ed 394, 32 S Ct 313]." Blair v. United States, 250 US, at 282, 63 L Ed 979.

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> "Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection . . . the underlying identifying characteristics — the constant factor throughout both public and private communications — are open for all to see or hear. There is no basis for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers. Hence, no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large." United States v. Doe (Schwartz), 457 F2d, at 898-899.

The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in Schmerber. "The [410 US 15] interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." Schmerber v. California, 384 US, at 769-770, 16 L Ed 2d 908. Similarly, a seizure of voice exemplars does not involve the "severe, though brief, intrusion upon cherished personal security," effected by the "patdown" in Terry — "surely . . . an annoying, frightening, and perhaps humiliating experience." Terry v. Ohio, 392 US, at 24-25, 20 L

Ed 2d 889. Rather, this is like the fingerprinting in Davis, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." Davis v. Mississippi, 394 US, at 727, 22 L Ed 2d 676; cf. Thom v. New York Stock Exchange, 306 F Supp 1002, 1009.

[4, 23, 24] Since neither the summons to appear before the grand jury nor its directive to make a voice recording infringed upon any interest protected by the Fourth Amendment, there was no justification for requiring the grand jury to satisfy even the minimal requirement of "reasonableness" imposed by the Court of Appeals.[13] See United States v. Doe (Schwartz), supra, at 899-900. A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge. Branzburg v. Hayes, 408 US, at 701, 33 L Ed 2d 626. No grand jury witness is "entitled to set limits to the investigation that the grand jury may conduct." Blair v. United States, 250 US, at 282, 63 L Ed 979. And a sufficient basis [410 US 16] for an indictment may only emerge at the end of the investigation when all the evidence has been received.

> "It is impossible to conceive that . . . the examination of witnesses must be stopped until a

13. In Hale v. Henkel, 201 US, at 77, 50 L Ed 652, the Court found that such a standard had not been met, but as noted above, supra, at 11-12, 35 L Ed 2d p 78, that was a case where the Fourth Amendment had been infringed by an overly broad subpoena to produce books and papers.

basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted." Hale v. Henkel, 201 US, at 65, 50 L Ed 652.

Since Dionisio raised no valid Fourth Amendment claim, there is no more reason to require a preliminary showing of reasonableness here than there would be in the case of any witness who, despite the lack of any constitutional or statutory privilege, declined to answer a question or comply with a grand jury request. Neither the Constitution nor our prior cases justify any such interference with grand jury proceedings.[14]

[25-27] The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime "unless on a presentment or indictment of a Grand Jury." This constitutional guarantee presupposes an investigative body "acting independently of either prosecuting attorney or judge," Stirone v. United States, 361 US 212, 218, 4 L Ed 2d 252, 80 S Ct 270, whose mission is to clear the innocent, no less than [410 US 17]

14. Mr. Justice Marshall, in dissent, post, p 31, 35 L Ed 2d p 87, suggests that a preliminary showing of "reasonableness" is required where the grand jury subpoenas a witness to appear and produce handwriting or voice exemplars, but not when it subpoenas him to appear and testify. Such a distinction finds no support in the Constitution. His dissent argues that there is a potential Fourth Amendment violation in the case of a subpoenaed grand jury witness because of the asserted intrusiveness of the initial subpoena to appear—the possible stigma from a grand jury appearance and the inconvenience of the official restraint. But the initial directive to appear is as intrusive if the witness is called simply to testify as it is if he is summoned to produce physical evidence.

to bring to trial those who may be guilty.[15] Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. Cf. United States v. Ryan, 402 US 530, 532-533, 29 L Ed 2d 85, 91 S Ct 1580; Costello v. United States, 350 US 359, 363-364, 100 L Ed 397, 76 S Ct 406; Cobbledick v. United States, 309 US 323, 327-328, 84 L Ed 783, 60 S Ct 540.[16] The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or

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[26] 15. "[T]he institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." Ex parte Bain, 121 US 1, 11, 30 L Ed 849, 7 S Ct 781 (quoting grand jury charge of Mr. Justice Field). See also Wood v. Georgia, 370 US 375, 390, 8 L Ed 2d 569, 82 S Ct 1364.

16. The possibilities for delay caused by requiring initial showings of "reasonableness" are illustrated by the Court of Appeals' subsequent decision in In re September 1971 Grand Jury, 454 F2d 580, rev'd sub nom. United States v. Mara, 410 US, p 19, 35 L Ed 2d 99, 93 S Ct 774, where the Court held that the Government was required to show in an adversary hearing that its request for exemplars was reasonable, and "reasonableness" included proof that the exemplars could not be obtained from other sources.

supervision [410 US 18] so long as it does not trench upon the legitimate rights of any witness called before it.

Since the Court of Appeals found an unreasonable search and seizure where none existed, and imposed a preliminary showing of reasonableness where none was required, its judgment is reversed and this case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINIONS

[410 US 22]

Mr. Justice Brennan, concurring in part and dissenting in part in No. 71-229, and dissenting in No. 71-850.*

I agree, for the reasons stated by the Court, that respondents Dionisio's Fifth Amendment claims are without merit. I dissent, however, from the Court's rejection of Fourth Amendment claims of Dionisio and Mara as also without merit. I agree that no unreasonable seizure in violation [410 US 23] of the Fourth Amendment is effected by a grand jury subpoena limited to requiring the appearance of a suspect to *testify*. But insofar as the subpoena requires a suspect's appearance in order to obtain voice or handwriting exemplars from him, I conclude, substantially in agreement with Part II of my Brother Marshall's dissent, that the reasonableness under the Fourth Amendment of

* Editor's Note: This opinion also applies to United States v. Mara (No. 71-850), p 99, infra.

such a seizure cannot simply be presumed. I would therefore affirm the judgments of the Court of Appeals reversing the contempt convictions and remand with directions to the District Court to afford the Government the opportunity to prove reasonableness under the standard fashioned by the Court of Appeals.

Mr. Justice Douglas, dissenting.*

Judge William Campbell, who has been on the District Court in Chicago for over 32 years, recently made the following indictment against the grand jury:[1]

> "This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."

It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive. [410 US 24] The concession by the Court that the grand jury is no longer in a realistic sense "a protective bulwark standing solidly between the

* Editor's Note: This opinion also applies to United States v. Mara (No. 71-850), p 99, infra.

1. 55 FRD 229, 253 (1972).

ordinary citizen and an overzealous prosecutor" is reason enough to affirm these judgments.

It is not uncommon for witnesses summoned to appear before the grand jury at a designated room to discover that the room is the room of the prosecutor. The cases before us today are prime examples of this perversion.

Respondent Dionisio and approximately 19 others were subpoenaed by the Special February 1971 Grand Jury for the Northern District of Illinois in an investigation of illegal gambling operations. During the investigation, the grand jury had received as exhibits voice recordings obtained under court orders, on warrants issued under 18 USC §2518 [18 USCS §2518], authorizing wiretaps. The witnesses were instructed to go to the United States Attorney's office with their own counsel if they desired, in the company of an FBI agent who had been appointed as an agent of the grand jury by its foreman, and to read the transcript of the wire interception. The readings were recorded. The grand jury then compared the voices taken from the wiretap and the witness's record. Dionisio refused to make the voice exemplars on the ground they would violate his rights under the Fourth and Fifth Amendments. The Government filed in the United States District Court for the Northern District of Illinois to compel the witness to furnish the exemplars to the grand jury. The court rejected the constitutional arguments of the respondent and demanded compliance. Dionisio again refused and was adjudged in civil contempt and placed in prison until he obeyed the court order or until the term of the special grand jury expired. The Court of Appeals reversed, concluding

that to compel compliance would violate his Fourth Amendment rights. It held that voice exemplars are protected by the Constitution from unreasonable [410 US 25] seizures and that the Government failed to show the reasonableness of its actions.

The Special September 1971 Grand Jury also in the Northern District of Illinois, was convened to investigate thefts of interstate shipments of goods that occurred in the State. Respondent Mara was subpoenaed and was requested to submit a sample of his handwriting before the grand jury. Mara refused. The Government went to the District Court for the Northern District of Illinois, asserting to the court that the handwriting exemplars were "essential and necessary" to the investigation. In an in camera proceeding, the Court held that the witness must comply with the request of the grand jury. The Court of Appeals reversed on the basis of its decision in In re Dionisio. It outlined the procedures the Government must follow in cases of this kind. First, the hearing to determine the constitutionality of the seizure must be held in open court in an adversary manner. Substantially, the Government must show that the grand jury was properly authorized to investigate a matter that Congress had power to regulate, that the information sought was relevant to the inquiry, and that the grand jury's request for exemplars was adequate, but not excessive, for the purposes of the relevant inquiry.

Today, the majority overrules this reasoned opinion of the Seventh Circuit.

Under the Fourth Amendment, law enforcement officers may not compel the production of evidence, absent a showing of

the reasonableness of the seizure. David v. Mississippi, 394 US 721, 22 L Ed 2d 676, 89 S Ct 1394; Boyd v. United States, 116 US 616, 29 L Ed 746, 6 S Ct 524. The test protects the person's expectation of privacy over the thing. We said in Katz v. United States, "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth [410 US 26 Amendment protection . . . .But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 US 347, 351-352, 19 L Ed 2d 576, 88 S Ct 507. The Government asserts that handwriting and voice exemplars do not invade the privacy of an individual when taken because they are physical characteristics that are exposed to the public. It argues that, unless the person involved is a recluse, these characteristics are not meant to be private to the individual and thus do not qualify for the aid of the Fourth Amendment.

This Court has held that fingerprints are subject to the requirements of the Search and Seizure Clause of the Fourth Amendment, Davis v. Mississippi, supra. On the other hand, facial scars, birthmarks, and other facial features have been said to be "in plain view" and not protected. United States v. Doe (Schwartz), 457 F2d 895.

In Davis, the sheriff in Mississippi rounded up 24 blacks when a rape victim described her assailant only as a young Negro. Each was fingerprinted and then released. Davis was presented to the victim but was not identified. He was jailed without probable cause, and only later did the FBI confirm that

his fingerprints matched those on the window of the victim's home. The Court held that the fingerprints could not be admitted, as they were seized without reasonable grounds. "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" Davis v. Mississippi, supra, at 726-727, 22 L Ed 2d 676. The dragnet effect in Dionisio, where approximately 20 people were subpoenaed [410 US 27] for purposes of identification, was just the kind of invasion that the Davis case sought to prevent. Facial features can be presented to the public regardless of the cooperation or compulsion of the owner of the features. But to get the exemplars, the individual must be involved. So, although a person's handwriting is used in everyday life and speech is the vehicle of normal social intercourse, when these personal characteristics are sought for purposes of identification, the Government enters the zone of privacy and, in my view, must make a showing of reasonableness before seizures may be made.

The Government contends that since the production was before the grand jury, a different standard of constitutional law exists because the grand jury has broad investigatory powers. Blair v. United States, 250 US 273, 63 L Ed 979, 39 S Ct 468. Cf. United States v. Bryan, 339 US 323, 94 L Ed 884, 70 S Ct 724. The Government concedes that the Fourth Amendment applies to the grand jury and prevents it from executing subpoenas duces tecum that are overly broad. Hale v. Henkel, 201 US 43,

76, 50 L Ed 652, 26 S Ct 370. It asserts, however, that that is the limit of its application. But the Fourth Amendment is not so limited, as this Court has held in Davis, supra, and reiterated in Terry v. Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, where it held that the Amendment comes into effect whether or not there is a fullblown search. The essential purpose is to extend its protection "wherever an individual may harbor a reasonable 'expectation of privacy.'" Id., at 9, 20 L Ed 2d 889.

Just as the nature of the Amendment rebels against the limits that the Government seeks to impose on its coverage, so does the nature of the grand jury itself. It was secured at Runnymede from King John as a cornerstone of the liberty of the people. It was to serve as a buffer between the state and the offender. For no matter how obnoxious a person may be, the United States cannot prosecute for a felony without an indictment [410 US 28] The individual is therefore protected by a body of his peers who have no axes to grind or any Government agency to serve. It is the only accusatorial body of the Federal Government recognized by the Constitution. "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge"[2] Stirone v. United States,

2. As Mr. Justice Black said in In re Groban, 352 US 330, 346-347, 1 L Ed 2d 376, 77 S Ct 510:

> "The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of

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361 US 212, 218, 4 L Ed 2d 252, 80 S Ct 270. But here, as the Court of Appeals said, "It is evident that the grand jury is seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars." In re Dionisio, 442 F2d 276, 280. See [410 US 29] Hannah v. Larche, 363 US 420, 497-499, 4 L Ed 2d 1307, 80 S Ct 1502 (Douglas, J., dissenting). Are we to stand still and watch the prosecution evade its own constitutional restrictions on its powers by turning the grand jury into its agent? Are we to allow the Government to usurp powers that were granted to the people by the Magna Carta and codified in our Constitution? That will be the result of the majority opinion unless we continue to apply to the grand jury the protection of the Fourth Amendment.

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> them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them." (Black, J., dissenting.)

Although that excerpt is from a dissent on the particular facts of the case, there could be no disagreement as to the accuracy of the description of the grand jury's historical function.

The tendency is for government to use shortcuts in its search for instruments more susceptible to its manipulation than is the historic grand jury. See Hannah v. Larche, 363 US 420, 505 4 L Ed 2d 1307, 80 S Ct 1502 (Douglas, J., dissenting); Jenkins v. McKeithen, 395 US 411, 23 L Ed 2d 404, 89 S Ct 1843.

As the Court stated in Hale v. Henkel, 201 US, at 59, 50 L Ed 652, "the most valuable function of the grand jury" was "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."

The Court held in that case that the Fourth Amendment was applicable to grand jury proceedings and that a sweeping all-inclusive subpoena was "equally indefensible as a search warrant would be if couched in similar terms." Id., at 77, 50 L Ed 652.

Of course, the grand jury can require people to testify. Hale v. Henkel makes plain that proceedings before the grand jury do not carry all of the impedimenta of a trial before a petit jury. To date, the grand jury cases have involved only testimonial evidence. To say, as the Government suggests, that nontestimonial evidence is free from any restraint imposed by the Fourth Amendment is to give those who today manipulate grand juries, vast and uncontrollable power.

The Executive, acting through a prosecutor, could not have obtained these exemplars as it chose, for as stated by the Court of Appeals for the Eighth Circuit, "We conclude that the taking of the handwriting exemplars . . . was a search and seizure under the Fourth Amendment." United States v. Harris, 453 F2d 1317, 1319. As Katz v. United States, supra, makes plain, the searches that may be made without prior approval by judge or magistrate [410 US 30] are "subject only to a few specifically established and well delineated exceptions." 389 US, at 357, 19 L Ed 2d 576.

The showing required by the Court of Appeals in the Mara case was that the Government's showing of need for the exemplars be "reasonable," which "is not necessarily synonymous with probable cause." 454 F2d 580, 584. When we come to grand juries, probable cause in the strict Fourth Amendment meaning of the term does not have in it the same ingredients pointing toward guilt as it does in the arrest and trial of people. In terms of probable cause in the setting of the grand jury, the question is whether the exemplar sought is in some way connected with the suspected criminal activity under investigation. Certainly less than that showing would permit the Fourth Amendment to be robbed of all of its vitality.

In the Mara case, the prosecutor submitted to the District Court an affidavit of a Government investigator stating the need for the exemplar based on his investigation. The District Court passed on the matter in camera, not showing the affidavit to either respondent or his counsel. The Court of Appeals, relying on Alderman v. United States, 394 US 165, 183, 22 L Ed 2d 176, 89 S Ct 961, held that in such cases there should be an adversary proceeding. 454 F2d, at 582-583. If "reasonable cause" is to play any function in curbing the executive appetite to manipulate grand juries, there must be an opportunity for a showing that there was no "reasonable cause." As we stated in Alderman: "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the informaiton contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth [410 US 31] Amendment exclusionary rule demands." 394 US, at 184, 22 L Ed 2d 176.

The District Court in the Dionisio case went part way be allowing the witness to have his counsel present when the voice exemplars were prepared in the prosecutor's office. 442 F2d, at 278. The Court of Appeals acted in a traditionally fair way when it ruled that the reasonableness of a prosecutor's request for exemplars be put down for an adversary hearing before the District Court. It would be a travesty of justice to allow the prosecutor to do under the cloak of the grand jury what he could not do on his own.

In view of the disposition which I would make of these cases, I need not reach the Fifth Amendment question. But lest there be any doubt as to where I stand, I adhere to my position in United States v. Wade, 388 US 218, 243, 18 L Ed 2d 1149, 87 S Ct 1926 (separate statement), and in Schmerber v. California, 384 US 757, 773, 16 L Ed 2d 908, 86 S Ct 1826 (Black, J., dissenting, joined by Douglas, J.), 778, 16 L Ed 2d 908 (Douglas, J., dissenting), to the effect that the Fifth Amendment is not restricted to testimonial compulsion.

Mr. Justice Marshall, dissenting.*

I

The Court considers United States v. Wade, 388 US 218, 221-223, 18 L Ed 2d 1149, 87 S Ct 1926 (1967), and Gilbert v. California, 388 US 263, 265-267, 18 L Ed 2d 1178, 87 S Ct 1951 (1967), dispositive of respondent Dionisio's contention that compelled production of a voice exemplar would [410 US 32]

* Editor's Note: This opinion also applies to United States v. Mara (No. 71-850), p 99, infra.

violate his Fifth Amendment privilege against compulsory self-incrimination. Respondent Mara also argued below that compelled production of the handwriting and printing exemplars sought from him would violate his Fifth Amendment privilege. I assume the Court would consider Wade and Gilbert to be dispositive of that claim as well.[1] The Court reads those cases as holding that voice and handwriting exemplars may be sought for the exclusive purpose of measuring "the physical properties" of the witness' voice or handwriting without running afoul of the Fifth Amendment privilege. Ante, at 7, 35 L Ed 2d 75. Such identification evidence is not within the purview of the Fifth Amendment, the Court says, for, at least since Schmerber v. California, 384 US 757, 764, 16 L Ed 2d 908, 86 S Ct 1826 (1966), it has been clear that while "the privilege is a bar against compelling 'communications' or 'testimony,' . . . compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

I was not a Member of this Court when Wade and Gilbert were decided. Had I been, I would have found it most difficult to join those decisions insofar as they dealt with the Fifth Amendment privilege. Since, as I discuss in Part II, I consider the Fourth Amendment to require affirmance of the decisions below in these cases, I need not rely at this time upon the Fifth Amendment privilege. Nevertheless, I feel constrained to express here at least my serious reservations concerning the Fifth Amendment portions of Wade and Gilbert, since those decisions are so central to the Court's result today.

1. Before this Court, respondent Mara has argued only that the Government may be seeking the handwriting exemplars to obtain not merely identification evidence, but incriminating "testimonial" evidence. I certainly agree with the Court that if respondent's contention proves correct, he will be entitled to assert his Fifth Amendment privilege.

The root of my difficulty with Wade and Gilbert is the testimonial evidence limitation that has been imposed upon the Fifth Amendment privilege in the decisions of this Court. That limitation is at odds with [410 US 33] what I have always understood to be the function of the privilege. I would, of course, include testimonial evidence within the privilege, but I have grave difficulty drawing a line there. For I cannot accept the notion that the Government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without the cooperation of the suspect. Indeed, until Wade and Gilbert, the Court had never carried the testimonial limitation so far as to allow law enforcement officials to enlist an individual's overt assistance — that is, to enlist his will — in incriminating himself. And I remain unable to discern any substantial constitutional footing on which to rest that limitation on the reach of the privilege.

Certainly it is difficult to draw very much support for the testimonial limitation from the language of the Amendment itself. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." Nowhere is the privilege explicitly restricted to testimonial evidence. To read such a limitation into the privilege through its reference to "witness" is just the sort of crabbed construction of the provision that this Court long eschewed. Thus, some 80 years ago the Court rejected the contention that a grand jury witness could not invoke the privilege because it applied, in terms, only in a "criminal case." Counselman v. Hitchcock, 142 US 547, 562, 35 L Ed 1110, 12 S Ct 195 (1892). The Court emphasized that the privilege "is as

broad as the mischief against which it seeks to guard." Ibid. Even earlier, the Court, in holding that the privilege could be invoked in the context of a civil forfeiture proceeding, had warned that:

> "Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation [410 US 34] of the right, as if it consisted more in sound than in substance." Boyd v. United States, 116 US 616, 635, 29 L Ed 746, 6 S Ct 524 (1886).

Moreover, Boyd itself, which involved a subpoena directed at private papers, makes clear that "witness" is not to be restricted to the act of giving oral testimony against oneself. Rather, that decision suggests what I believe to be the most reasonable construction of the protection afforded by the privilege, namely, protection against being "compell[ed] . . . to furnish evidence against" oneself, id., at 637, 29 L Ed 746. See also Schmerber v. California, 384 US, at 776-777, 16 L Ed 2d 908 (Black, J., dissenting).

Such a construction is dictated by the purpose of the privilege. In part, of course, the privilege derives from the view that certain forms of compelled evidence are inherently unreliable. See, e.g., In re Gault, 387 US 1, 47, 18 L Ed 2d 527, 87 S Ct 1428 (1967). But the privilege — as a constitutional guarantee subject to invocation by the individual — is obviously

far more than a rule concerned simply with the probative force of certain evidence. Its roots "tap the basic stream of religious and political principle [and reflect] the limits of the individual's attorneyment to the state. . . ." Ibid. Its "constitutional foundation . . . is the respect a government — state or federal — must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government to shoulder the entire load' . . . , to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 US 436, 460, 16 L Ed 2d 694, 86 S Ct 1602, 10 ALR3d 974 (1966). Cf. also Rogers v. Richmond, 365 US 534, 540-541, 5 L Ed 2d 760, 81 S Ct 735 (1961). It is only by prohibiting the Government from compelling an individual to cooperate [410 US 35] affirmatively in securing incriminating evidence which could not be obtained without his active assistance, that "the inviolability of the human personality" is assured. In my view, the testimonial limitation on the privilege simply fails to take account of this purpose.

The root of the testimonial limitation seems to be Mr. Justice Holmes' opinion for the Court in Holt v. United States, 218 US 245, 54 L Ed 1021, 31 S Ct 2 (1910). In Holt, the defendant challenged the admission at trial of certain testimony that a blouse belonged to the defendant. A witness testified that defendant put on the blouse and that it fitted him. The defendant argued that this testimony violated his Fifth

Amendment privilege because he had acted under duress. In the course of disposing of the defendant's argument, Mr. Justice Holmes said that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." Id., at 252-253, 54 L Ed 1021. This remark can only be considered dictum, however, for the case arose before this Court established the rule that illegally seized evidence may not be admitted in federal court, see Weeks v. United States, 232 US 383, 58 L Ed 652, 34 S Ct 341 (1914), and thus Holt's claim of privilege was ultimately disposed of simply on the ground that "when [a man] is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. Adams v. New York, 192 US 585 [48 L Ed 575, 24 S Ct 372]." 218 US, at 253, 54 L Ed 245.

With its decision in Schmerber, however, the Court elevated the dictum of Holt to full constitutional stature. Mr. Justice Holmes' language was central to the Court's conclusion that the taking of a blood sample, over the objection of the individual, to determine alcoholic content was not barred by the Fifth Amendment privilege since [410 US 36] the resulting blood test evidence "was neither [the individual's] testimony nor evidence relating to some communicative act. . . ." 384 US, at 765, 16 L Ed 2d 908. Indeed, the Court appeared to consider it established since Holt that the Fifth Amendment privilege extended only to "'testimony'" or "'communications,'" but not to "'real or physical evidence.'" id., at 764, 16 L Ed 2d 908; and this "established" principle was sufficient, for the Court, to dispose

of any "loose dicta" in Miranda that might suggest a more extensive purpose for the privilege.

After Schmerber, Wade and Gilbert were relatively easy steps for a Court focusing exclusively on the nature of the evidence compelled. Thus, the Court indicated that "compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber," was "no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse." 388 US, at 222, 18 L Ed 2d 1149. Similarly, in Gilbert, 388 US, at 266-267, 18 L Ed 2d 1178, the Court reasoned that "[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection."

Yet, if we look beyond the testimonial limitation, Wade and Gilbert clearly were not direct and easy extensions of Schmerber and Holt. For it is only in Wade and Gilbert that the Court, for the first time, held in effect that an individual could be compelled to give to the State evidence against himself which could be secured only through his affirmative cooperation — that is, "to accuse himself by a volitional act which differs only in degree from compelling him to act out the crime," Wade v. United States, 388 US, at 261, 18 L Ed 2d 1149 (Fortas, J., concurring in part and dissenting in part). The voice and handwriting samples sought in Wade and Gilbert simply could not be obtained without the individual's [410 US 37] active cooperation. Holt and Schmerber were certainly not such cases. In those instances the individual was required, at most, to

submit passively to a blood test or to the fitting of a shirt. Whatever the reasoning of those decisions, I do not understand them to involve the sort of interference with an individual's personality and will that the Fifth Amendment privilege was intended to prevent. To be sure, in situations such as those presented in Holt and Schmerber the individual may resist and be physically subdued, and in that sense, compulsion may be employed. Or, alternatively, the individual in those situations may elect to yield to the threat of contempt and cooperate affirmatively with his accusers, thus eliminating the need for force and, in that sense, his will may be subverted. But in neither case is the intrusion on an individual's dignity the same or as severe as the affront that occurs when the state secures from him incriminating evidence that can be obtained *only* by enlisting the cooperation of his will. Thus, I do not necessarily consider the results in Holt and Schmerber to be inconsistent with the purpose and proper reach of the Fifth Amendment privilege.[2]

But so long as we have a Constitution which protects at all costs the integrity of individual volition against subordinating state power, Wade and Gilbert must be viewed as legal anomalies. As Mr. Justice Fortas, joined by Mr. Justice Douglas and the Chief Justice, argued on the day those cases were decided:

> "Our history and tradition teach and command that an accused may stand mute. The

2. This is not to say that, apart from the Fifth Amendment privilege, there might not be serious due process problems with physical compulsion applied to an individual's person to secure identifying evidence against his will. Cf. Rochin v. California, 342 US 165, 96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396 (1952). But cf. Breithaupt v. Abram, 352 US432, 1 L Ed 2d 448, 77 S Ct 408 (1957).

> privilege means just that; not less than that. According to the [409 US 38] Court, an accused may be jailed — indefinitely — until he is willing to say, for an identifying audience, whatever was said in the course of the commission of the crime. Presumably this would include, 'Your money or your life' — or perhaps, words of assault in a rape case. This is intolerable under our constitutional system." United States v. Wade, 388 US, at 260, 18 L Ed 2d 1149.

See also Gilbert v. California, 388 US, at 291-292, 18 L Ed 1178 (Fortas, J., concurring in part, and dissenting in part).

I fear the Court's decisions today are further illustrations of the extent to which the Court has gone astray in defining the reach of the Fifth Amendment privilege and has lost touch with the Constitution's concern for the "inviolability of the human personality." In both these cases, the Government seeks to secure possibly incriminating evidence that can be acquired only with respondents' affirmative cooperation. Thus, even if I did not consider the Fourth Amendment to require affirmance of the decisions of the Court of Appeals, I would nevertheless find it extremely difficult to accept a reversal of those decisions in the face of what seems to me the proper construction of the Fifth Amendment privilege.

II

The Court concludes that the exemplars sought from the respondents are not protected by the Fourth Amendment

because respondents have surrendered their expectation of privacy with respect to voice and handwriting by knowingly exposing these to the public, see Katz v. United States, 389 US 347, 351, 19 L Ed 2d 576, 88 S Ct 507 (1967). But, even accepting this conclusion, it does not follow that the investigatory seizures of respondents, accomplished through the use of subpoenas ordering them to appear before the grand jury—and thereby necessarily interfering [409 US 39] with their personal liberty—are outside the protection of the Fourth Amendment. To the majority, though, "[i]t is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome." Ante, at 9, 35 L Ed 2d at 76. With due respect, I find nothing "clear" about so sweeping an assertion.

There can be no question that investigatory seizures effected by the police are subject to the constraints of the Fourth and Fourteenth Amendments. In Davis v. Mississippi, 394 US 721, 727, 22 L Ed 2d 676, 89 S Ct 1394 (1969), the Court observed that only the Term before, in Terry v. Ohio, 392 US 1, 19, 20 L Ed 2d 889, 88 S Ct 1868 (1968), it had rejected "the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" As a result, the Court held in Davis that investigatory seizures for the purpose of obtaining fingerprints are subject to the Fourth Amendment even though fingerprints themselves are not protected by that Amendment.[3] The Court now seems to

3. We left open the further question whether such an investigatory seizure might, under certain circumstances, be made on information insufficient to establish probable cause to arrest. See 394 US, at 727-728, 22 L Ed 2d 676.

distinguish Davis from the present cases, in part, on the ground that in Davis the authorities engaged in a lawless dragnet of a large number of Negro youths. Certainly, the peculiarly offensive exercise of investigatory powers in Davis heightened the Court's sensitivity to the dangers inherent in Mississippi's argument that the Fourth Amendment was not applicable to investigatory seizures. But the presence of a dragnet was not the constitutional determinant there; rather, it was police interference with the petitioner's own liberty that brought the Fourth and Fourteenth [410 US 40] Amendments into play, as should be evident from the Court's substantial reliance on Terry which involved no dragnet.

Like Davis, the present cases involve official investigatory seizures that interfere with personal liberty. The Court considers dispositive, however, the fact that the seizures were effected by the grand jury, rather than the police. I cannot agree.

First, in Hale v. Henkel, 201 US 43, 76, 50 L Ed 652, 26 S Ct 370 (1906), the Court held that a subpoena duces tecum ordering ["the production of books and papers [before a grand jury] may constitute an unreasonable search and seizure within the Fourth Amendment,"] and on the particular facts of the case, it concluded that the subpoena was "far too sweeping in its terms to be regarded as reasonable." Considered alone, Hale would certainly seem to carry a strong implication that a subpoena compelling an individual's personal appearance before a grand jury, like a subpoena ordering the production of private papers, is subject to the Fourth Amendment standard of reasonableness. The protection of the Fourth Amendment is not,

after all, limited to personal "papers," but extends also to "persons," "houses," and "effects." It would seem a strange hierarchy of constitutional values that would afford papers more protection from arbitrary governmental intrusion than people.

The Court, however, offers two interrelated justifications for excepting grand jury subpoenas directed at "persons," rather than "papers," from the constraints of the Fourth Amendment. These are a "historically grounded obligation of every person to appear and give his evidence before the grand jury," ante, at 9-10, 35 L Ed 2d at 77, and the relative unintrusiveness of the grand jury subpoena on an individual's liberty.

In my view, the Court makes more of history than is justified. The Court treats the "historically grounded [410 US 41] obligation" which it now discerns as extending to all "evidence," whatever its character. Yet, so far as I am aware, the obligation "to appear and give evidence" has heretofore been applied by this Court only in the context of testimonial evidence, either oral or documentary. Certainly the decisions relied upon by the Court, despite some dicta, have not recognized an obligation of a broader sweep.

Blair v. United States, 250 US 273, 281, 63 L Ed 979, 39 S Ct 468 (1919), indicated only that "the giving of *testimony* and the attendance upon court or grand jury in order to *testify* are public duties which every person . . . is bound to perform upon being properly summoned . . . ." (Emphasis added.) Similarly, just last Term, the Court reaffirmed only that "[t]he power of government to compel persons to *testify* in court or before grand

juries and other governmental agencies is firmly established in Anglo-American jurisprudence," nothing more. Kastigar v. United States, 406 US 441, 32 L Ed 2d 212, 92 S Ct 1653 (1972) (emphasis added.) And, Mr. Chief Justice Hughes described "one of the duties which the citizen owes to his government" to be that of "attending its courts and giving his *testimony* whenever he is properly summoned . . . . Blackmer v. United States, 284 US 421, 438, 76 L Ed 375, 52 S Ct 252 (1932). (Emphasis added). In short, history, at least insofar as heretofore reflected in this Court's cases, does not necessarily establish an obligation to appear before a grand jury for other than testimonial purposes. See Branzburg v. Hayes, 408 US 665, 33 L Ed 2d 626, 92 S Ct 2646 (1972); Ullmann v. United States, 350 US 422, 439 n 15, 100 L Ed 511, 76 S Ct 497, 53 ALR2d 1008 (1956); Piemonte v. United States, 367 US 556, 559 n 2, 6 L Ed 2d 1028, 81 S Ct 1720 (1961); Wilson v. United States, 221 US 361, 372 55 L Ed 771, 31 S Ct 538 (1911); Hale v. Henkel, 201 US, at 65, 50 L Ed 652. See also United States v. Bryan, 339 US 323, 331, 94 L Ed 884, 70 S Ct 724 (1950); Brown v. Walker, 161 US 591, 600, 40 L Ed 819, 16 S Ct 644 (1896); Garland v. Torre, 259 F2d 545, 549 (CA 2), cert denied, 358 US 910, 3 L Ed 2d 231, 79 S Ct 237 (1958).

[410 US 42]

In the present cases—as the Court itself argues in its discussion of the Fifth Amendment privilege—it was not testimony that the grand juries sought from respondents, but physical evidence. The Court glosses over this important distinction from its prior decisions, however, by artificially

bifurcating its analysis of what is taking place in these cases—that is, by effectively treating what is done with individuals once they are before the grand jury as irrelevant in determining what safeguards are to govern the procedures by which they are initially compelled to appear. Nonetheless, the fact remains that the historic exception to which the Court resorts is not necessarily as broad as the context in which it is now employed. Hence, I believe that the question we must consider is whether an extension of that exception is warranted, and if so, under what conditions.

In approaching these questions, we must keep in mind that "[t]his Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as of the very essence of constitutional liberty . . . .'" Harris v. United States, 331, US 145, 150 91 L Ed 1[illegible], 67 S Ct 1098 (1947). As a rule, the Amendment stands as an essential bulwark against arbitrary and unreasonable governmental intrusion—whatever its form, whatever its purpose, see, e.g., Camara v. Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967)—upon the privacy and liberty of the individual, see, e.g., Terry v. Ohio, 392 US, at 9, 20 L Ed 2d 889; Jones v. United States, 362 US 257, 261, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960). Given the central role of the Fourth Amendment in our scheme of constitutional liberty, we should not casually assume that governmental action which may result in interference with individual liberty is excepted from its requirements. Cf. Coolidge v. New Hampshire, 403 US 443, 455, 29 L Ed 2d 564, 91 S Ct 2022 (1971); Katz v. United States, 389 US, at 357, 19 L Ed 2d 576; Camara v. Municipal Court, supra,

at 528-529, 18 L Ed 2d 930. The reason for any exception [410 US 43] to the coverage of the Amendment must be fully understood and the limits the exception should be defined accordingly. To do otherwise would create a danger of turning the exception into the rule and lead to the "impairment of the rights for the protection of which [the Amendment] was adopted," Go-Bart Importing Co. v. United States, 282 US 344, 357, 75 L Ed 374, 51 S Ct 153 (1931); cf. Grau v. United States, 287 US 124, 128 77 L Ed 212, 53 S Ct 38 (1932).

The Court seems to reason that the exception to the Fourth Amendment for grand jury subpoenas directed at persons is justified by the relative unintrusiveness of the grand jury process on an individual's liberty. The Court, adopting Chief Judge Friendly's analysis in United States v. Doe (Schwartz), 457 F2d 895, 898 (CA2 1972), suggests that arrests or even investigatory "stops" are inimical to personal liberty because they may involve the use of force; they may be carried out in demeaning circumstances; and at least an arrest may yield the social stigma of a record. By contrast, we are told, a grand jury subpoena is a simple legal process, that is served in an unoffensive manner; it results in no stigma; and a convenient time for appearance may always be arranged. The Court would have us believe, in short, that, unlike an arrest or an investigatory "stop," a grand jury subpoena entails little more inconvenience than a visit to an old friend. Common sense and practical experience indicate otherwise.

It may be that service of a grand jury subpoena does not involve the same potential for momentary embarrassment as

does as arrest or investigatory "stop."[4] But this difference seems inconsequential in comparison to the substantial stigma that — contrary to the Court's assertion — may result from a grand jury appearance as well as from an arrest or investigatory seizure. Public [410 US 44] knowledge that a man has been summoned by a federal grand jury investigating, for instance, organized criminal activity can mean loss of friends, irreparable injury to business, and tremendous pressures on one's family life. Whatever nice legal distinctions may be drawn between police and prosecutor, on the one hand, and the grand jury, on the other, the public often treats an appearance before a grand jury as tantamount to a visit to the station house. Indeed, the former is frequently more damaging than the latter, for a grand jury appearance has an air of far greater gravity than a brief visit "downtown" for a "talk." The Fourth Amendment was placed in our Bill of Rights to protect the individual citizen from such potentially disruptive governmental intrusion into his private life unless conducted reasonably and with sufficient cause.

Nor do I believe that the constitutional problems inherent in such governmental interference with an individual's person are substantially alleviated because one may seek to appear at a "convenient time." In Davis v. Mississippi, 394 US, at 727, 22 L Ed 2d 676, it was recognized that an investigatory detention effected by the police "need not come unexpectedly or at an inconvenient time." But this fact did not suggest to the Court that the Fourth Amendment was inapplicable; it was considered to affect, at most, the type of showing a State would have to

4. But cf. David v. Mississippi, 394 US, 721, 727, 22 L Ed 2d 676, 89 S Ct 1394 (1969).

make to justify constitutionally such a detention, see ibid. No matter how considerate a grand jury may be in arranging for an individual's appearance, the basic fact remains that his liberty has been officially restrained for some period of time. In terms of its effect on the individual, this restraint does not differ meaningfully from the restraint imposed on a suspect compelled to visit the police station house. Thus, the nature of the intrusion on personal liberty caused by a grand jury subpoena cannot, without more, be considered sufficient basis for denying [410 US 45] respondents the protection of the Fourth Amendment.

Of course, the Fourth Amendment does not bar all official seizures of the person, but only those that are unreasonable and are without sufficient cause. With this in mind, it is possible, at least, to explain, if not justify, the failure to apply the protection of the Fourth Amendment to grand jury subpoenas requiring individuals to appear and *testify*. Thus, while it is true that we have traditionally given the grand jury broad investigatory powers, particularly in terms of compelling the appearance of persons before it, see, e.g., Branzburg v. Hayes, 408 US, at 688, 701-702, 33 L Ed 626; Blair v. United States, 250 US, at 282, 63 L Ed 979, it must be understood that we have done so in heavy reliance on certain essential assumptions.

Certainly the most celebrated function of the grand jury is to stand between the government and the citizen and thus to protect the latter from harassment and unfounded prosecution. See, e.g., Wood v. Georgia, 370 US 375, 390, 8 L Ed 2d 569, 82 S Ct 1364 (1962); Hoffman v. United States, 341 US 479, 485, 95 L Ed 1118, 71 S Ct 814 (1951); Ex parte Bain, 121 US 1, 11, 30

L Ed 849, 7 S Ct 781 (1887). The grand jury does not shed those characteristics that give it insulating qualities when it acts in its investigative capacity. Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people. Hale v. Henkel, 201 US, at 61, 50 L Ed 652. As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep. The anticipated neutrality of the grand jury, even when acting in its investigative capacity, may perhaps be relied upon to prevent unwarranted interference with the lives of private citizens and to ensure that the grand jury's subpoena powers over the person are exercised in only a reasonable fashion. Under such circumstances, it may be justifiable to give the grand jury broad personal subpoena powers that are outside the purview [410 US 46] of the Fourth Amendment, for — in contrast to the police — it is not likely that it will abuse those powers.[5] Cf. Costello v. United States, 350 US 359, 362, 100 L Ed 397, 76 S Ct 406 (1956); Stirone v. United States, 361 US 212, 218, 4 L Ed 2d 252, 80 S Ct 270 (1960).

Whatever the present day validity of the historical assumption of neutrality that underlies the grand jury process,[6] it must at least be recognized that if a grand jury is deprived of the independence essential to the assumption of neutrality — if it effectively surrenders that independence to a prosecutor — the

5. When the grand jury does overstep its power and acts maliciously, courts are certainly not totally without power to control it. See n 9, infra.

6. Indeed, the Court today acknowledges that "[t]he grand jury may not always serve its historic role as a protective bulwark." Ante, at 17, 35 L Ed 2d at 81.

dangers of excessive and unreasonable official interference with personal liberty are exactly those that the Fourth Amendment was intended to prevent. So long as the grand jury carries on its investigatory activities only through the mechanism of testimonial inquiries, the danger of such official usurpation of the grand jury process may not be unreasonably great. Individuals called to testify before the grand jury will have available their Fifth Amendment privilege against self-incrimination. Thus, at least insofar as incriminating information is sought directly from a particular criminal suspect,[7] the grand jury process would not appear to offer law enforcement officials a substantial advantage over ordinary investigative techniques.

But when we move beyond the realm of a grand jury investigation limited to testimonial inquiries, as the Court does today, the danger increases that law enforcement officials may seek to usurp the grand jury process for the purpose of securing incriminating evidence from a particular suspect through the simple expedient of a subpoena. In view of the Court's Fourth Amendment analysis of the respondents' expectations of privacy concerning their handwriting and voice exemplars, and in view of the testimonial evidence limitation on the reach of the Fifth Amendment privilege, there is essentially no objection to be made once a suspect is before the grand jury and exemplars are requested. Thus, if the grand jury may summon criminal

7. Of course, the grand jury does provide an important mechanism for investigating possible criminal activity through witnesses who may have first-hand knowledge of the activities of others. But given the Fifth Amendment privilege, it does not follow that the grand jury is a useful mechanism for securing incriminating testimony from the suspect himself.

suspects for such purposes without complying with the Fourth Amendment, it will obviously present an attractive investigative tool to prosecutor and police. For what law enforcement officers could not accomplish directly themselves after our decision in Davis v. Mississippi, they may now accomplish indirectly through the grand jury process.

Thus, the Court's decisions today can serve only to encourage prosecutorial exploitation of the grand jury process, at the expense of both individual liberty and the traditional neutrality of the grand jury. Indeed, by holding that the grand jury's power to subpoena these respondents for the purpose of obtaining exemplars is completely outside the purview of the Fourth Amendment, the Court fails to appreciate the essential difference between real and testimonial evidence in the context of these cases, and thereby hastens the reduction of the grand jury into simply another investigative device of law enforcement officials. By contrast, the Court of Appeals, in proper recognition of these dangers, imposed narrow limitations on the subpoena power of the grand jury that are necessary to guard against unreasonable [410 US 48] official interference with individual liberty but that would not impair significantly the traditional investigatory powers of that body.

The Court of Appeals in Mara, 410 US 19, 35 L Ed 2d 99, 93 S Ct 774, did not impose a requirement that the Government established probable cause to support a grand jury's request for exemplars. It correctly recognized that "examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual," since the very purpose of

the grand jury process is to ascertain probable cause see, e.g., Blair v. United States, 250 US, at 282, 63 L Ed 979; Hendricks v. United States, 223 US 178, 184, 56 L Ed 394, 32 S Ct 313, 454 F2d 580, 584 (1912). Consistent with this Court's decision in Hale v. Henkel, the Court of Appeals ruled only that the request for physical evidence such as exemplars should be subject to a showing of reasonableness. See 201 US, at 76, 50 L Ed 652. This "reasonableness" requirement has previously been explained by this Court, albeit in a somewhat different context, to require a showing by the Government that: (1) "the investigation is authorized by Congress"; (2) the investigation "is for a purpose Congress can order"; (3) the evidence sought is "relevant"; and (4) the request is "adequate, but not excessive, for the purposes of the relevant inquiry." See Oklahoma Press Publishing Co. v. Walling, 327 US 186, 209, 90 L Ed 614, 66 S Ct 494, 166 ALR 531 (1946). This was the interpretation of the "reasonableness" requirement properly adopted by the Court of Appeals. See 454 F2d, at 584-585. And, in elaborating on the requirement that the request not be "excessive," it added that the Government would bear the burden of showing that it was not conducting "a general fishing expedition under grand jury sponsorship." Id., at 585.

These are not burdensome limitations to impose on the grand jury when it seeks to secure physical evidence, [410 US 49] such as exemplars, that has traditionally been gathered directly by law enforcement officials. The essence of the requirement would be nothing more than a showing that the evidence sought is relevant to the purpose of the investigation and that the particular grand jury is not the subject of prosecutorial abuse—a showing that the Government should have little difficulty

making, unless it is in fact acting improperly. Nor would the requirement interfere with the power of the grand jury to call witnesses before it, to take their testimony, and to ascertain their knowledge concerning criminal activity. It would only discourage prosecutorial abuse of the grand jury process.[8] The "reasonableness" requirement would do no more in the context of these cases than the Constitution compels—protect the citizen from unreasonable and arbitrary governmental interference, and ensure that the broad subpoena powers of the grand jury which [410 US 50] the Court now recognizes are not turned into a tool of prosecutorial oppression.[9]

8. It is, of course, true that a suspect may be called for the dual purposes of testifying and obtaining physical evidence. Obviously, his liberty would be interfered with merely as a result of appearing and testifying, a situation in which the Fourth Amendment has not heretofore been applied. But it does not follow that the application of the Fourth Amendment is inappropriate when a suspect is subpoenaed for these dual purposes. The application of the Fourth Amendment is necessary to discourage unreasonable use of the grand jury process by law enforcement officials. While the Fifth Amendment privilege at least contributes to that goal in the context of a subpoena intended to secure both testimonial and physical evidence, it is essential also to apply the Fourth Amendment when the suspect is requested to give physical evidence. Otherwise, subpoenaing suspects for the purpose of testifying would provide a simple guise by which law enforcement officials might secure physical evidence without complying with the Fourth Amendment, and thus the deterrent effect on such officials sought by applying the Amendment to grand jury subpoenas seeking physical evidence would be lost.

9. It may be that my differences with the Court are not as great as may first appear, for despite the Court's rejection of the applicability of the Fourth Amendment to grand jury subpoenas directed at "persons," it clearly recognized that abuse of the grand jury process is not outside a court's control. See ante, at 11-12, 35 L Ed 2d 77, 78. Besides the Fourth Amendment, the First Amendment and both the Due Process Clause and the privilege against compulsory self-incrimination contained in the Fifth Amendment erect substantial barriers to "the transformation of the grand jury into an instrument of oppression." Ibid. See also Hale v. Henkel, 201 US, at 65, 50 L Ed 652; United States v. Doe (Schwartz), 457 F2d 895, 899.

United States v. Dionisio

In Dionisio, No. 71-229, the Government has never made any showing that would establish the "reasonableness" of the grand jury's request for a voice sample. In Mara, No. 71-850, the Government submitted an affidavit to the District Court to justify the request for the handwriting and printing exemplars. But it was not sufficient to meet the requirements set down by the Court of Appeals. See 454, F2d, at 584-585. Moreover, the affidavit in Mara was reviewed by the District Court in camera in the absence of respondent Mara and his counsel. Such ex parte procedures should be the exception, not the rule.

> "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment . . . demands."[10] Alderman

10. As the Court of Appeals observed:

> "[D]ifficulties of locating a suspect or possessor of evidence, the problems of apprehension, the destructibility of evidence, the need for promptness to protect the public against violence and to prevent repetition of criminal conduct necessitate the ex parte nature of the warrant issuance proceeding." 454 F2d 580, 583.

But these considerations do not apply in the context of a grand jury request for exemplars. Nevertheless, the Government contends that the traditional secrecy of the grand jury process dictates that any preliminary showing required of it should be made in an ex parte, in camera proceeding. However, the interests served by the secrecy of the grand jury process can be adequately protected without such a drastic measure, see id., at 584.

v. United States, 394 US 165, 184, 22 L Ed 2d 176, 89 S Ct 961 (1969).

[410 US 51]

See also Dennis v. United States, 384 US 855, 873-875, 16 L Ed 2d 973, 86 S Ct 1840 (1966). Consequently, I agree with the Court of Appeals that the reasonableness of a request for an exemplar should be tested in an adversary context.[11]

I would, therefore, affirm the Court of Appeals' decisions reversing the judgments of contempt against respondents and order the cases remanded to the District Court to allow the Government an opportunity to make the requisite showing of "reasonableness" in each case. To do less is to invite the very sort of unreasonable governmental intrusion on individual liberty that the Fourth Amendment was intended to prevent.

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11. The Court suggests that any sort of showing that might be required of the Government in cases such as these "would saddle a grand jury with mini trials" and "would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." Ante. at 17, 35 L Ed 2d at 81. But constitutional rights cannot be sacrificed simply for expedition and simplicity in the administration of the criminal laws. Moreover, a requirement that the Government establish the "reasonableness" of the request for an exemplar would hardly be so burdensome as the Court suggests. As matters stand, if the suspect resists the request, the Government must seek a judicial order directing that he comply with the request. Thus, a formal judicial proceeding is already necessary. The question whether the request is "reasonable" would simply be one further matter to consider in such a proceeding.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1273

JOSEPH E. SHAMY, PETITIONER

v.

JONATHAN GOLDSTEIN, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the refusal to enjoin respondent, the United States Attorney for the District of New Jersey, and other federal officers, from presenting certain subpoenaed corporate documents to a grand jury. Petitioner alleges that the records had been wrongfully transferred to agents of the Internal Revenue Service and requested that the court enjoin respondents from presenting or disseminating the subpoenaed documents to the grand jury, or to any other governmental entity, and order the government to return all the subpoenaed documents to him (Pet. App. 1a-2a).

After concluding that petitioner was "acutely aware of the scope of the Grand Jury's inquiry as well as the relevancy of the submitted documents" (Pet. App. 6a) and reviewing *in camera* an affidavit of an Assistant United States Attorney setting out the substance of the grand jury probe and the relevancy of the subpoenaed records (Pet. App. 6a-7a), the district court dismissed petitioner's suit, ruling that he had failed to state a claim upon which relief could be granted. The court of appeals affirmed without opinion (Pet. App. 8a-9a).

Petitioner contends: (1) that the decision below conflicts with *In re Grand Jury Proceedings*, 486 F.2d 85 (C.A. 3), and *United States* v. *Dionisio*, 410 U.S. 1; (2) that the transfer of the subpoenaed records to agents of the Internal Revenue Service violated Rule 6(e) of the Federal Rules of Criminal Procedure; and (3) that it was improper for the United States Attorney to conduct a grand jury investigation into an income tax matter until after the Internal Revenue Service referred the matter to the Department of Justice for prosecution.

1. The court of appeals correctly affirmed the district court's dismissal of the complaint for failure to state a cause of action. The essence of petitioner's claim is that the grand jury subpoena was a mere subterfuge and had been issued solely for the purpose of allowing the Internal Revenue Service to acquire the information. But the district court concluded that the grand jury was engaged in a bona fide investigation. In view of the well-recognized broad investigative powers of the grand jury (see, *e.g.*, *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643; *Blair* v. *United States*, 250 U.S. 273, 282), petitioner's unsupported claim of subterfuge could not cast doubt upon the propriety of a duly issued subpoena by that body. As the district court stated: "To hold that the target of a Grand Jury investigation could prevent the submission of evidence to a duly constituted Grand Jury on a bald allegation of subterfuge would perversely hamper the traditional investigative function of the Grand Jury" (Pet. App. 5a). See *United States* v. *Calandra*, 414 U.S. 338, 342-346. The complaint therefore failed to state a cause of action and was properly dismissed.

Furthermore, the district court required the Assistant United States Attorney to file an affidavit, for *in camera* review, setting forth the relevancy and materiality of the

subpoenaed documents to the grand jury investigation (Pet. App. 6a).[1] After reviewing the affidavit, the court concluded that "the subpoenaed documents are relevant to a legitimate Grand Jury investigation" (Pet. App. 7a) and that the subpoenaed records were properly turned over to agents of the Internal Revenue Service for its expert analysis in order to assist the grand jury in its investigation (Pet. App. 3a-5a). Contrary to petitioner's argument (Pet. 10-11), the agents' examination of the records was entirely appropriate and did not violate the rule of secrecy surrounding grand jury proceedings set forth in Rule 6(e) of the Federal Rules of Criminal Procedure. The grand jury is entitled to obtain expert advice in appraising such documentary evidence. See, *e.g.*, *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464 (E.D. Pa); *In re July 1973 Grand Jury*, 374 F. Supp. 1334 (N.D. Ill.).

2. Even had there been some valid basis upon which to challenge the validity of the subpoena, petitioner did not use the normal procedure available for such a purpose. Instead, he voluntarily complied with the subpoena's command to produce the material. The peculiar procedural course followed by petitioner is evidently designed to avoid the effect of the well-settled rule that a person who seeks to resist the production of information must choose between compliance with the court's order to produce and resistance to the order, with the possibility of an adjudication of contempt if his claims are rejected

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[1]Petitioner argues (Pet. 11) that this *in camera* review deprived him of his right to examine the affidavit. When a party summoned to appear before a grand jury makes an unsupported claim that the grand jury is not engaged in a legitimate investigation, the most that can be required of the government attorney conducting the grand jury investigation is a sworn statement which satisfies the court that the grand jury has commenced a good faith criminal investigation. See *In re Kadish*, 377 F. Supp. 951, 952 (N.D. Ill.). Any further proceedings would "saddle * * * [the] grand jury with minitrials and preliminary showings [which] would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio, supra*, 410 U.S. at 17. It is therefore immaterial whether the government's showing is made *in camera* or in open court.

on appeal. *United States* v. *Ryan*, 402 U.S. 530, 532-533; *Cobbledick* v. *United States*, 309 U.S. 323. Here, petitioner complied with the grand jury subpoena and only then sought to litigate the propriety of the grand jury's request in a context in which he did not have to choose between compliance and contempt. However, this compliance with the subpoena terminates any objection he might otherwise have to use of the materials by the grand jury.[2]

3. Contrary to petitioner's further contention (Pet. 8), there is no conflict with *In re Grand Jury Proceedings*, *supra*. There, the court held that before a grand jury witness could be adjudged in contempt for failure to comply with a direction of the grand jury, the government was required to make a preliminary showing that the direction was relevant to an investigation being conducted by the grand jury and properly within its jurisdiction. Here, however, petitioner complied with the direction of the grand jury by appearing and producing the subpoenaed corporate records, and the government made a preliminary showing of relevancy.[3] Moreover, even if some conflict could be discerned between the two cases, there is no need for review by this Court, since both decisions are by the same circuit.

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[2]The appropriate remedy in this context, if any, is not the injunction petitioner seeks against the grand jury's use of the subpoenaed records but an objection to their introduction against him at any subsequent criminal proceeding. See *United States* v. *Ryan*, *supra*, 402 U.S. at 532, n. 3, citing *United States* v. *Blue*, 384 U.S. 251, 255. However, given the fact that the subpoenaed documents were corporate records and not eligible for the claim of the Fifth Amendment privilege (see *e.g.*, *Wilson* v. *United States*, 221 U.S. 361), it is difficult to see how petitioner could bar their introduction at trial.

[3]*United States* v. *Dionisio*, *supra*, cited by petitioner (Pet. 9), is not to the contrary. There, the Court held that the compelled production of voice exemplars before a grand jury would not violate the witnesses' Fifth Amendment privilege or the Fourth Amendment.

4. Finally, petitioner contends (Pet. 12-13) that a grand jury may not investigate a tax matter until after the Internal Revenue Service has processed the case and referred the matter to the Department of Justice for prosecution. Petitioner cites no authority for this novel proposition, and, in fact, the power of the grand jury to indict is plenary and is not limited by internal agency regulations outlining the preliminary procedure that is usually followed. *United States* v. *Goldstein*, 342 F. Supp. 661, 668-669 (E.D. N.Y.); *In re Goldman*, 331 F. Supp. 509, 510 (W.D. Pa.). Cf. *Sullivan* v. *United States*, 348 U.S. 170. Contrary to the situation involved in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, where the petitioner was denied a deportation hearing prescribed by regulation, the grand jury investigation of petitioner's income tax liability prior to any recommendation for prosecution by the Internal Revenue Service did not materially affect petitioner's rights. In the event of an indictment, petitioner will have available the protection of a full trial at which his guilt or innocence will be determined.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

DOJ-1975-06